UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IRISH 4 REPRODUCTIVE HEALTH, ET AL.,	)	
Plaintiffs,	)	
vs.	)	3:18-CV-491
U.S. DEPARTMENT OF LABOR, ET AL.,	)	
Defendants.	)	

TRANSCRIPT OF ORAL ARGUMENT ON MOTION TO DISMISS
June 20, 2019
BEFORE THE HONORABLE PHILIP P. SIMON
UNITED STATES DISTRICT JUDGE

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(The following proceedings were held in open court beginning at 10:07 a.m., reported as follows:)

DEPUTY CLERK: All rise.

THE COURT: Good morning, everyone.

You can be seated.

All right. We're on the record in Cause No. 3:18-CV-491. Irish 4 Reproductive Health versus HHS, et al.

So why don't I have everybody introduce themselves so I know who we're dealing with here.

MR. KAIRIS: Matt Kairis for Notre Dame.

THE COURT: Good to see you again, Mr. Kairis.

MR. DICK: Anthony Dick for Notre Dame.

THE COURT: All right.

MS. KOPPLIN: Rebecca Kopplin for the federal defendants, Your Honor.

THE COURT: Okay.

MR. MACEY: Jeff Macey for the plaintiffs, Your Honor.

THE COURT: Mr. Macey.

MS. GREEN: Carmen Green for the plaintiffs.

THE COURT: Okay.

MS. TANNER: Alison Tanner for the plaintiffs.

THE COURT: All right.

MS. BANKER: Michelle Banker for the plaintiffs.

THE COURT: You guys brought a whole load of people

here.

Mr. Kairis, I assume you'll be speaking for Notre Dame?

MR. KAIRIS: Actually, Anthony Dick will.

THE COURT: All right. Mr. Dick will. Okay.

Obviously, Ms. Kopplin, you'll be speaking for the federal defendants.

Who can I be talking to here -- so it would be Ms. Tanner, is it?

MS. TANNER: Yes. Michelle Banker and Alison Tanner will be splitting the argument for the plaintiffs, Your Honor.

THE COURT: Okay. Fair enough.

You have given me a lot to digest here. It's an interesting case. I'll hear from Notre Dame first. I will give you as much time as you reasonably need, and then, you know, when I have heard enough, I'll tell you.

MR. DICK: Thank you, Your Honor. Anthony Dick for the University of Notre Dame.

So the only claim that names Notre Dame as a defendant in this case is a challenge to the settlement agreement, and it's our submission that the settlement agreement is unreviewable under *Heckler v. Chaney*, which generally bars judicial review of executive enforcement decisions; and, in particular, in this case, the settlement agreement that was reached between the government and the University of Notre Dame, along with a group of other plaintiffs in various lawsuits. The government in

that settlement agreement promised that it would not enforce the contraceptive mandate against the University.

THE COURT: Why did the government settle the case?

MR. DICK: The government settled the case for a number of reasons. Number one, to get rid of the claims that Notre Dame had brought against the government for a RFRA violation under the mandate. The government had actually lost a number of those cases.

THE COURT: I thought the government won seven out of eight of them in the circuit courts.

MR. DICK: That's right. The government -- there was a circuit split. The government had won seven out of eight, but the Supreme Court --

THE COURT: It was the Eighth Circuit that had ruled and that's what prompted the appeal to the Supreme Court.

MR. DICK: Well, that was one of the things that prompted the appeal, right. The Supreme Court granted cert after that circuit split developed. But then the Supreme Court had vacated all of the various circuit court decisions and remanded the cases, so the government, essentially, had a big mess on its hands with wide disagreement among lower courts. You had a number of permanent injunctions that had been entered by district courts in favor of various plaintiffs.

The government had gotten its order from the Supreme Court in *Zubik* which effectively barred the government from enforcing

the accommodation against the plaintiffs while they had an opportunity to, basically, go back and work things out to try to find a solution that would satisfy both sides.

THE COURT: Right. I would understand why Notre Dame would want to, you know, settle the case. I don't understand why the government settled the case.

The overwhelming majority of the appellate courts had ruled that the RFRA claim was not a good one, and so why didn't they just reinstitute the accommodation and put it back in the lap of the Supreme Court to figure it out?

MR. DICK: Well, Your Honor, I suppose the government would be in a better position to answer that question than we would. I mean, from our perspective, we were quite confident in, ultimately, prevailing at the Supreme Court. In particular, after Justices Kavanaugh and Gorsuch joined the bench, because they were both on record as circuit judges joining or authoring opinions saying that the accommodation was a violation of RFRA, Justice Kavanaugh, then Judge Kavanaugh in the D.C. Circuit, wrote a dissent from the denial of en banc rehearing in *Priests for Life*, and then Judge Gorsuch joined a dissent from denial in the Tenth Circuit case taking the same position.

I understand Your Honor reached a different conclusion.

THE COURT: Well, on a very thin preliminary record too.

MR. DICK: Sure. Right.

THE COURT: To be fair.

MR. DICK: That's right.

And so I think all of that just goes to the point that there was a very sharp dispute. There were a number of courts that had gone different ways. To be sure, the circuits were lopsided seven to one; but from the government's perspective, they had these claims out there. They had the risk of attorney's fees in a lot of cases. They had, you know, just uncertainty that a lot of parties needed to deal with, and I think from their perspective they wanted to conclude these claims. They had promulgated a new rule which they could have argued may have mooted out some of the challenges, but there would have been a fight about mootness, about whether these claims were capable of repetition --

THE COURT: How is the settlement agreement being fair to the mandate of the Supreme Court to, essentially, try to preserve, you know, healthcare for women and under these circumstances? It seems like it's a total abdication of that.

MR. DICK: Well, Your Honor, we think that the Supreme Court's order was to give the parties an opportunity to go back and find a compromise that would satisfy all sides, and the government took the position that such a compromise was impossible because of the nature of the statutory mandate. It actually required the provision of this coverage in connection

with health plans.

The plaintiffs, and I was part of the team that had briefed the case in the Supreme Court in *Zubik* and various other cases, was part of the settlement negotiations, and the plaintiffs felt very strongly that the regulatory methods that the government was trying to use were insufficient to provide the kind of separation from the coverage that they believed their religious views required.

And as a result of that, the government said it couldn't reach a compromise, so it had to choose one side or the other. And in this case, it chose to err on the side of protecting the religious liberty of the plaintiffs who were involved. We think that was certainly a fair and reasonable resolution at a time when there was a serious question about whether RFRA prohibited the enforcement of the accommodation.

THE COURT: All right. I mean, it would have been just as easy to -- I guess these are more questions for the federal defendants -- but to just require the Supreme Court to make a decision on it, right?

MR. DICK: Well, I think --

THE COURT: Other than collapsing and paying Jones Day a bunch of money and making Notre Dame whole, essentially. I mean, it was a total collapse.

MR. DICK: Well, with respect, Your Honor, it wasn't a total collapse in the sense that the new administration that

came in had a choice about whether it was going to require contraceptive coverage as part of the mandate at all. And there were many people who were urging the new administration to take the position, because, remember, Congress did not define what preventative care means. It left it up to executive discretion.

So the new administration came in and many people were urging it to redefine preventive care, as it, obviously, would have had authority to do, to not include controversial contraceptives, including some that many consider to be abortion-inducing drugs. Instead, the new administration decided that it would keep that definition in place.

THE COURT: What else can preventive care be? I mean, is it --

MR. DICK: Preventive care all across the board.

THE COURT: Across the --

MR. DICK: Cancer screenings, all kinds of things. Congress, I would submit, probably could not have enacted a law that would have specifically referenced contraceptive coverage in it, so they punted on that to the administration.

But my only point is the new administration kept that mandate in place. It estimated that the religious exemption would apply to fewer than .1 percent of women who would be affected by employer-based coverage, so 99.9 percent of employers throughout the country continued to be covered. It's

only a very narrow slice of employers that actually objected to this on religious grounds.

I think the administration decided that for that very small portion of employers who have sincere conscience-based objections, in a diverse and pluralistic society, there are other employers, there are other universities, that people have a right to go to. There is room in a diverse and pluralistic society for a very tiny portion of employers and universities like Notre Dame where they can be out from under the heel of this federal mandate.

And, you know, there's a natural sorting. It's a free society. People can decide to go to other universities. They can decide to go to other employers, and all we're asking for, and the administration decided to grant, is in this very small -- it's a minority religious view these days; and in a very small circumstance, we're going to allow some diversity, we're going to allow some people that have an exemption, rather than putting them to the choice of violating their religious beliefs or facing severe penalties.

THE COURT: But when, you know, the White House changed and the view of what preventive care, you know, might mean, is it not true that the agency that was tasked with deciding what that means came up with a laundry list of services that needed to be covered? Did those remain the same?

MR. DICK: I believe they did, Your Honor.

Certainly --

THE COURT: Based on the Institute of Medicine's evaluation?

MR. DICK: Correct.

THE COURT: What's the name of that agency, HR something?

MR. DICK: Yeah, the Health Resources Services Administration, I believe, HRSA. The government will correct me if I'm wrong with respect to the precise acronym. I think she's indicating that I have it right.

They, of course, you know, have discretion based on a number of factors under *Chevron* to decide what preventive services mean. The new administration decided to reach this compromise position where it would keep the mandate in place for almost every employer in the country, 99.9 percent, and only create this very narrow religious exemption.

And the plaintiffs have tried to portray this as depriving women nationwide of coverage. We think it is quite a reasonable and narrow compromise that applies in very limited circumstances.

THE COURT: But any employer can opt for it.

MR. DICK: Only if the employer has sincere religious or moral objections, which is quite a small universe of employers.

THE COURT: How do you know that?

MR. DICK: Well, we know that because of the number of people who brought claims, who brought RFRA claims, and who have sought to take advantage of the exemptions that exist, the regulatory exemptions. There is just a very, very small number.

The government in the final rules that they promulgated discussed their estimate, and I think they have been reasonably accurate with that. The government can speak more to, perhaps, how they got to that estimate, but I don't think the plaintiffs have disputed that that's a very small, very small number.

THE COURT: So your position is, and maybe you can flesh this out for me on the settlement agreement, that I don't really need to get to that issue unless I find that the rules have been promulgated improperly? Can you flesh that out for me?

MR. DICK: That's right, Your Honor.

So we think, basically, and we have argued this in terms of prudential ripeness, that the Court would have discretion to manage its docket and to say, "Look, as long as there are regulations that exempt the University from the mandate, then the settlement is a moot point," because the settlement just says, "We're not going to enforce any regulations that may apply." There are currently no regulations that apply as long as the regulatory exemption remains in place. So we think the most sensible course of action would be to wait until that

regulatory dispute is fully resolved.

As Your Honor pointed out, the Supreme Court is probably going to have to answer this at the end of the day. We think that could happen by the end of next term. Again, we feel quite confident that the regulations, the exemption, will be upheld.

And I would just point out, late last week, something I just found out about, there has now been a nationwide injunction issued by the Northern District of Texas prohibiting the enforcement of the accommodation -- prohibiting the government from enforcing the accommodation, so that's a case call *Deotte*. I have a copy.

THE COURT: Say that again. So I know there's the nationwide injunction in Philadelphia, I think it was.

MR. DICK: Correct.

THE COURT: Somewhere in the Third Circuit.

MR. DICK: Right.

THE COURT: And then there's a regional injunction out of the Ninth Circuit.

MR. DICK: That's right, Your Honor.

THE COURT: Are you saying the injunction in Texas is the opposite --

MR. DICK: Yes.

THE COURT: -- of the injunction in --

MR. DICK: Essentially, yes.

So the injunction issued by the Northern District of Texas late last week, and the case is called *Deotte*, D-E-O-T-T-E -- I have a copy of the opinion if Your Honor would like to see it -- the judge there certified a nationwide class of employers who object to the accommodation.

And the reason that was a live dispute is because you had the nationwide injunction in Philadelphia striking down the exemption, so you had a defensive suit brought by objecting religious employers in Texas. And the judge there just granted this nationwide injunction in favor of the religious objectors saying, "Okay. If you're going to strike down the exemption, I'm going to enjoin," and did, enter permanent injunction against the accommodation. So you've now got -- it's a giant mess, Your Honor.

THE COURT: What a mess.

MR. DICK: And we think this underscores why the Supreme Court is likely to get involved. We think the Supreme Court is likely to say, "Enough is enough. The regulations are valid. The government has discretion not to enforce this against religious objectors."

THE COURT: So what is -- this settlement agreement, was it unique to just Notre Dame and HHS, or, as I understand it, there were 70 other similar settlement agreements?

MR. DICK: That's right. Well, not similar settlement agreements. There was this one settlement that was

entered between the government and 74, I believe it was, plaintiffs who had brought a number of suits. I mean, many of these suits --

THE COURT: This Exhibit A --

MR. DICK: Correct.

THE COURT: -- is this a global settlement --

MR. DICK: Correct.

THE COURT: -- of --

MR. DICK: Okay. And Exhibit B lists the cases that were brought to which those parties were plaintiffs.

THE COURT: I see.

So has anybody else challenged the settlement agreement in any of those other cases?

MR. DICK: Not to our knowledge, Your Honor. Frankly, we think that's because it's quite obviously unreviewable under *Heckler*. These are the first plaintiffs who thought that a Court could possibly review the settlement, which is a nonenforcement agreement; so in our view, it's just clearly unreviewable.

The regulations, we agree, are challengeable in a proper case. When the government says it's not going to enforce a regulation against a named group of parties in a way of settling the claims those parties have brought, there's just no case ever where a Court has reviewed that kind of thing that we've found. And we just think under *Heckler* it's clearly

barred by Supreme Court precedent.

THE COURT: So no other claim has been brought around the country challenging any of these other 73 --

MR. DICK: Correct, not challenging the settlement as far as we are aware.

THE COURT: You can continue.

MR. DICK: Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Dick.

Ms. Kopplin, I guess I'll hear from you now.

MS. KOPPLIN: Thank you, Your Honor. So if it's all right with Your Honor, I'd like to start with the settlement agreement since that's where Mr. Dick just left off.

THE COURT: Sure.

MS. KOPPLIN: There's just a couple things that jumped out at me as you two were talking that I thought I would chime in on as we went.

First, to the question of why the government settled these cases, I guess I have to temper your expectations. I don't know that much about that, and I'm not sure how much I could say on the record if I did, but I think the key point is that the decision of how to prioritize resources from litigation and when to settle cases is committed to the agencies, and that's a decision that the executive branch made in this case appropriately. That's not something -- we would agree with Notre Dame, that that should be unreviewable under *Heckler v.*

Chaney.

You also had mentioned the *Zubik* orders, and, of course, one of plaintiffs' main objections to the settlement agreement is that they believe it violates *Zubik*.

Similarly, reading *Zubik*, it's clear the Supreme Court is not mandating that any particular policy steps be taken. They do ask the parties be afforded an opportunity to solve their problems, and the agencies tried very hard to do this. As we described in our briefing, the agencies asked for public comments and actually reviewed more than 54,000 of them -- this is all during the prior Obama administration -- and ultimately concluding during that administration they just could not find a way to satisfy both sides completely, but it certainly was not --

THE COURT: What was wrong with the accommodation paradigm that was set up before? I mean, eight circuits had agreed with the government that this wasn't a violation of RFRA and things were going great for the government in the litigation. So why did they give up the ghost? I mean, it's mystifying to me.

MS. KOPPLIN: Again, I'm just speculating because I don't have anything to say about that in particular. I think you're referencing that there was circuit court decisions. In the district courts, the record was much more mixed than that. The Supreme Court had not definitively ruled on this question

of whether or not there are entities that are substantially burdened by the accommodation.

We now take the position that there are such entities, and that's something the Supreme Court was explicitly avoiding deciding in *Zubik*. I think the Supreme Court recognizes this is a very difficult question. I mean, to be frank, Your Honor, if the Supreme Court had a specific policy in mind, they probably would have ordered the parties to do it. They kind of gave this punt to say go back and look at it yourselves because they were hoping the parties were going to work it out because of the difficulty of these issues.

THE COURT: Right. But things would have been a lot easier if the government had just stuck with the original regulation and forced the issue with the Supreme Court and got an answer, right? Instead, you just collapsed on it and gave the plaintiffs in all of those cases exactly what they wanted, and paid their lawyer fees.

MS. KOPPLIN: I mean, respectfully, Your Honor, I guess I'm not sure if there's much more I can say about that. The government's taken the position now that it feels is correct.

One thing I wanted to note on this question of -- I know you spoke a lot with Mr. Dick about how the number of employers affected is actually likely to be small and you were asking how do we know it is going to be small. This is in the rules, and

I'm sure you've read that, sort of the government's predictions of how many people would be affected.

I just wanted to also point out the reason we expect it to be small is because there's no financial incentive to opt out. It seems people generally understand that paying for contraceptives might even be cheaper than paying for, sort of, postpartum and prepartum care. So financially there's not going to be a big drive here that people will be opting out just for fun or because they want to save money somehow, so we don't really expect people would have any incentive to opt out unless they had a sincere religious objection.

So going to *Heckler*, and this is sort of addressing Count 1, which is plaintiffs' attempts to challenge the settlement agreement under the APA, as Notre Dame alluded to, this is a decision that's been committed to the agency's discretion. And that's for all the same reasons the Supreme Court was relying on in *Heckler*, the fact that there's limited enforcement resources agencies have, the fact that they have to prioritize those decisions, and the fact this is akin to prosecutorial discretion.

And as we mentioned in our briefing, there's a number of cases that hold that a nonenforcement settlement agreement is basically the same as a nonprosecution agreement in terms of *Heckler v. Chaney*.

I would like to also briefly address Count 2, which is

where the plaintiffs have sort of raised this common law illegality challenge to the settlement agreement. As we mentioned in our briefing, there's a number of procedural issues with this. And in many ways, it collapses with the merits of the final rules.

So I'll just point out, in addition to the problems with *Zubik* I mentioned, it's especially odd that plaintiffs think that their same constitutional challenges and ACA challenges apply to the settlement agreement.

For example, plaintiffs identify nothing the ACA that would tell the agencies when they have to take enforcement action. There's nothing in there that says, HHS, here is how you're going to decide which agencies you're going to prioritize. So it's not clear how a decision to settle a lawsuit could violate the ACA in that sense.

It's also not clear to me how, for example, plaintiffs' equal protection claims that they raise against the final rules could apply to the settlement agreement. A settlement agreement, by its nature, is about a discrete group of people. Here it's about the parties and the case the government was settling. It's not a classification that sort of cuts, you know, generally across the population the way the classifications are analyzed under the Equal Protection Clause. So I think that when you're looking at that, it's just important to be very careful to separate those things out.

I'd also like to briefly address plaintiffs' claims which they have added in their opposition that are not in their amended complaint that the settlement agreement violates internal DOJ guidance that they cite to in the opposition.

As we mentioned in our briefing, this is not legally binding. That guidance does not create a legal effect on anyone. So this is not the kind of thing that something could be void for illegality even if it did violate it; and on its terms, the settlement agreement is completely in compliance with that guidance. The guidance says everything else it says and then it says, "And this is something that should be interpreted with the discretion and the Attorney General can make exceptions as litigation calls for it." So this is not a situation where there has been a violation.

Finally, I think this is kind of just the direction the plaintiffs are taking us down, is this idea that they want to come into court and have judges be looking at DOJ's internal policy memos and asking if DOJ has correctly applied them in making every decision at whether to settle every piece of litigation, and that's not something that's been happening historically, and we would take the position that that's not something that the Court should do.

THE COURT: You don't need to say anything more about that.

MS. KOPPLIN: Thank you, Your Honor.

Unless you have further questions about the settlement agreement, I would like to talk about the final rules.

THE COURT: Sure.

MS. KOPPLIN: So, first, on the question of whether or not the final rules are procedurally proper, I think the first key point is that we're only looking now at the final rules. This is a -- plaintiffs are seeking prospective relief. Only the final rules are now in effect. So whatever happens to the plaintiffs in the future is going to happen because of the final rules, not the IFRs, and any relief that this Court could give would only be relief that could change the final rules.

THE COURT: Aren't the final rules tainted by what took place prior to that?

MS. KOPPLIN: No, Your Honor.

THE COURT: Why not?

MS. KOPPLIN: That's for several reasons.

First -- I just want to put this at the front level. Plaintiffs' taint theory would effectively prevent the government from ever being able to go back and make any rule in this area. And that just can't be right, that if the government did error once and issue a rule without proper notice and comment, there's some kind of a subject matter ban where now the government can never issue a rule about religious exemptions for contraception. That just can't be the case.

So that leads us to the question of, okay, so how should

the government then act to cure a problem with notice and comment. The answer is, the government should go back and it should do notice and comment. And then after that notice and comment, it should issue a new rule. And that's exactly what happened here.

THE COURT: Why do they issue these interim rules? This is not something I deal with very often, so you need to -- what was the point of the IFRs? Why not just do it the way you are supposed to do it?

MS. KOPPLIN: Well, sure, and they did do that eventually.

THE COURT: I understand that, but for the year that the IFRs were in the place -- just take it out of the context of this case. Educate me on that process because I don't understand it. Is that a common thing?

MS. KOPPLIN: In this context, it is very common. The IFRs are -- sorry. IFRs is also the process that past administrations used to issue the past exemptions here, so the initial exemption for churches and their integrated auxiliaries, that was done by the Obama administration as an IFR. So it's not something that's unusual or rare in this particular context.

So the reason for that is that the ACA actually gives statutory authority to the agencies to issue interim final regulations that may be necessary to carry out the mandate, and

that's 42 U.S.C. § 300gg-92. So that's a specific provision relating to the ACA.

In addition, the APA, in general, says that agencies can issue IFRs, so it can skip doing notice and comment first when there's good cause. And so this is in 5 U.S.C. § 553(b)(3)(B) and in 553(d)(3). There's two different possible definitions of good cause. So one is whenever it would be impractical, unnecessary, or contrary to the public interest to do a notice and comment first, and the other is a little bit broader than that.

So as we've explained in our briefing, the reason the agency did the IFR originally was because they had the statutory authority and they wanted to resolve the litigation and bring clarity sooner to that. Now, I do know that other Courts have disagreed that that was correct. So to sort of do a belt-and-suspenders approach, the agencies then went back and took comments and issued the final rules after those comments.

So the IFRs also are explicitly asking for comments. In the IFRs, it says, "This is an interim final rule with a request for comment. Here is how you submit your comments. Here's how long we will be taking comments for." So the agency had thought about that up front. They ultimately received about 110,000 comments they considered.

THE COURT: To the IFRs?

MS. KOPPLIN: To the IFRs. And those are the

comments they considered and responded to when they issued the final rules. I will even note that --

THE COURT: But the final rules are pretty much identical to the IFRs, correct?

MS. KOPPLIN: They're pretty similar. There were some clarifications made where people would have comments and say, "This is unclear to us," and they would kind of clarify, "This is what we meant." I wouldn't say there was any groundbreaking changes.

And plaintiffs in their brief kind of suggest, "Oh, that shows that the agencies weren't taking the comments seriously if they didn't make a complete about-face." But that's not the standard.

The APA says the agencies have to consider it and they have to explain their reasons. There's no requirement that they have to agree with any particular comment. And in this case, they just didn't agree with those comments.

And the Seventh Circuit has addressed the question of how open an agency's mind would be, and it did that in the *U.S. Steel Corp.* case that we mention in our briefing. So they are -- just like here, the EPA listed a list of non-attainment areas without doing notice and comment first. It issued an interim list, and then it took comments on that list and then it issued a final list.

And so the Seventh Circuit considered this question of,

"Well, was the agency's mind open when it took those comments even though it had already done its interim action?" It concluded that there was no reason to think the agency's mind wasn't open. It said, "Look, we looked at what the final rules said. They considered the comments and responded to them. There's no reason for us to think it would have responded differently if it had done it in the other order, so that's fine."

So applying that same logic here, the agencies have taken the 110,000 comments and they have responded to them. In fact, I believe the Court in California even concluded on the second go-around of the final rules that there was no reason to think the agencies hadn't adequately considered the comments and now the agencies have issued the final rules.

THE COURT: Did these rules supersede the prior rules, the so-called accommodation?

MS. KOPPLIN: I believe so. I'm sorry. They superseded the IFRs. The accommodation is still an option for people who want to use it.

THE COURT: If the Third Circuit affirms that nationwide injunction and deems the current regulations were improperly promulgated, does the old paradigm just go back into place or has that been erased by the actions with these new regulations? Do you understand what I'm getting at?

MS. KOPPLIN: I think you're asking if the exemption

for church and their integrated auxiliaries and the accommodation process still exists, and I think they do either way. The final rules don't try to write those out.

THE COURT: They are voluntary at this point.

MR. KAIRIS: Under the final rules, yes. I think if the final rules don't exist --

THE COURT: What I'm saying is would they be mandatory if it's found that the rulemaking was improper on the ones that are under consideration here?

MS. KOPPLIN: I mean, I think it would depend exactly what the Third Circuit's order said. But my understanding is if the Third Circuit just said, "We're going to vacate the final rules," then it would go back to how it was before the final rules were, barring any other judicial opinions that may have, you know, held otherwise or led to some kind of contrary position.

THE COURT: What's the status of that Third Circuit case; it's been argued?

MS. KOPPLIN: It was just argued a few weeks ago, I think, Your Honor.

THE COURT: Okay. And the Ninth Circuit case was just argued on Friday?

MS. KOPPLIN: Correct.

THE COURT: I had a chance to watch -- you can watch the videos of the Ninth Circuit arguments. I had a chance to

watch that.

MS. KOPPLIN: It's pretty cool.

THE COURT: Yeah, it is really cool, isn't it? It's very helpful to be able to do that.

It's very hard to read the tea leaves about what's going to happen, but my strong sense is that the Ninth Circuit's going to defer to what the Third Circuit does, in the sense of just stand down until the Third Circuit decides what it wants to do.

But if the rules are set aside, then we just go back to what it was under when Notre Dame came to this Court five years ago, is that right?

MS. KOPPLIN: I mean, like I said, I think it depends exactly what the orders say, because we've had some confusion, but that's my understanding, is that, if the Third Circuit says, "We're going to vacate these IFRs," then the accommodation still exists. It came from a different IFR, right. The exemption still exists. And, again, that's setting aside anything other Courts may be doing to the contrary.

I know counsel from Notre Dame mentioned this *Deotte* case.

THE COURT: Right.

MS. KOPPLIN: So I guess unless you have further questions about the procedural issues, I would like to move to the merits of the final rules.

THE COURT: Sure.

MS. KOPPLIN: So there's two main arguments here. One is that the final rules are authorized by the Women's Health Amendment in the ACA; they are completely in harmony with it. And two is that they are both authorized and required by RFRA. So I'll start with the Women's Health Amendment.

In the ACA, the Women's Health Amendment requires that HRSA set up comprehensive guidelines to describe what additional preventative care and screenings for women will be covered. And there's a couple references in this section.

And this is 42 U.S.C. § 300gg-13(a)(4).

THE COURT: Got it here.

MS. KOPPLIN: There's a couple references in this section that suggest that HRSA is getting quite a bit of discretion to make decisions here. So first is the fact that it's referring to comprehensive guidelines, and those guidelines don't exist yet. So Congress knows that HRSA is going to make them up.

Two, so broad that Congress hasn't even said, "You have to cover contraception." Like, that's kind of the level of generality that HRSA is operating at.

Three, as we mention in our briefing, this provision doesn't say that it has to be evidence-based or evidence-informed, even though other provisions do limit HRSA that way, to being evidence-based or evidence-informed -- I'm sorry -- not HRSA or whoever the appropriate decision-maker

would be.

Fourth, this provision says that the regulation should be as provided for by HRSA, suggesting that HRSA has the discretion to select not just the services to be covered but also the manner in which those services be provided and who will provide them.

THE COURT: So did HRSA change its mind prior to the issuance of the new regulations -- rules?

MS. KOPPLIN: My understanding is that HRSA is a subsidiary of HHS, so HRSA kind of -- whatever the secretary of HHS says, he has authority over HRSA, so HRSA, you know, is in line with --

THE COURT: Just by fiat he can -- I mean, doesn't this direct HRSA to do a full-blown study and figure out what should be in this pot and what shouldn't be? And they did that. And did they redo that before issuing these new rules?

MS. KOPPLIN: I think what happened is just what's described in the rules themselves, here was the process that was followed.

THE COURT: So the answer is no, really. They didn't go back to the Institute of Medicine and ask for a re-evaluation or anything like that, just somebody in Washington changed their mind.

MS. KOPPLIN: Well, I will point out -- again --

THE COURT: Is that right?

MS. KOPPLIN: I don't have any information about that other than what's in their rules. So what I'm telling you happened, I guess, is -- what is in their rules is what happened.

THE COURT: And nothing in the rules suggest that HRSA as an agency with the assistance of the Institute of Medicine, or whatever it's known by now, did -- changed their view of what should go in this pot of preventative care?

MS. KOPPLIN: Well, I mean, again, HRSA is a component that answers to HHS; so to the extent that HHS takes a position, I don't know if we can separate out if HRSA has taken that position or not.

THE COURT: But the statute directs HRSA to do that, not HHS writ large. Does that matter?

MS. KOPPLIN: I don't think it does. I don't know that plaintiffs have advanced any arguments on this point. But, again, we take the position that HRSA is just a component of HHS that answers to HHS.

And this is also the same way -- again, going back in time, this is the same way this has been done previously by past administrations to make the initial exemption for churches and their integrated auxiliaries and the accommodation, which I understand plaintiffs do not object to and yet --

THE COURT: Slow down.

MS. KOPPLIN: Sorry.

So that's the same process that led to both of those. I don't understand plaintiffs to object to those, so it seems strange to now just object because they don't like the content of this third iteration.

THE COURT: But they didn't object to them because it was after a comprehensive study that was done by HRSA. Whereas, here, it doesn't seem like there was any of that. It was just flip the switch and change the policy.

MS. KOPPLIN: I'm sorry, Your Honor. So I understand that HRSA did do a study to arrive at the list of contraceptives, but I was referring to when the initial exemption for churches and their integrated auxiliaries went into effect.

I don't know that HRSA went back and did research on the issue of churches and their integrated auxiliaries and did a study on that point. I don't know that HRSA did a similar study on the accommodation either on the effect of letting this be provided -- you know, through the third-party administrators and the issuers.

And, finally, in this entire realm of the Women's Health Amendment, this is HHS's statute to interpret. They have the expertise here, and we argue that they are entitled to *Chevron* deference, which means that plaintiffs have to show not just that their reading is a sensible reading but that our reading is, in fact, foreclosed by the statute, which in light of the

past practice in this area I don't know how it could be foreclosed by the statute.

If you don't have further questions on the ACA, I would like to address RFRA.

THE COURT: (Nodding.)

MS. KOPPLIN: Thank you, Your Honor.

So RFRA is a generalized statute, all right, a background norm for the federal government. It tells the federal government it cannot substantially burden a person's exercise of religion unless the application of that burden to that person is the least restrictive means of further and compelling government interest. So we kind of have two arguments here I'll just lay out before I get into them.

In *Hobby Lobby*, the Supreme Court did identify a substantial burden on nonprofit corporations like Hobby Lobby, in that it found that it was substantial because the size of penalties the ACA imposed were so large.

So, first, our position is that in light --

THE COURT: That was mandating contraception by the employer, by the employer's plan, right?

MS. KOPPLIN: Correct.

THE COURT: And, you know, that's a reasonable decision that, of course, that substantially burdens somebody's exercise of their religious beliefs. But the Notre Dame case, by way of example, is just a completely different kettle of

fish. They weren't requiring them to include it in their health plan.

MS. KOPPLIN: So I think that the logic of *Hobby Lobby* actually dictates that Notre Dame is also substantially burdened. *Hobby Lobby* is very --

THE COURT: How is that?

MS. KOPPLIN: *Hobby Lobby* says we can't second-guess these individuals. It's not for the Court to try and draw a line and tell them if their practice, you know, really is what their practice is. So when an entity says, "It substantially burdens my religious practice to be complicit in this process where I submit this form and later contraceptives are provided through my plan," we can't be second-guessing if that really isn't a violation of religious belief or not.

THE COURT: That's what they were doing prior to the accommodation.

MS. KOPPLIN: I'm sorry. That's what --

THE COURT: They were telling employees, "We don't cover this." And now they're just telling the federal government, "We don't cover this."

MS. KOPPLIN: I mean, again, I don't --

THE COURT: How is that -- I don't understand that.

MS. KOPPLIN: I am not an objector, so I don't know if I could explain it to you. But I'm saying that if there are people, which I understand there are, who say, "Providing this

form to the government to lead -- to start this process, this violates my religious beliefs," the Supreme Court in *Hobby Lobby* told us it's not for Courts to try and draw that line and say, "This seems really similar to the other notice you used to be giving," to me.

THE COURT: In *Hobby Lobby*, Hobby Lobby as a corporation did not want to provide on their dime contraceptive services. Good on them. That's their business. That's not what we're talking about here.

MS. KOPPLIN: So just to clarify. So our first argument is that in *Hobby Lobby* that was the substantial burden identified, the one on those for-profit corporations. At the time, the agencies had chosen to respond to that burden through the accommodation. They said, "Look, we made this accommodation, here is what you can do."

And our position is that that was a permissible response under RFRA but also that the agencies have leeway under RFRA to make a reasonable response and that they can now say, "Okay, we previously chose to meet that substantial burden of the accommodation, but now we are going to take the more straightforward path and just create the exemption instead. The accommodation was a bit convoluted, people were having problems with it. To meet that same substantial burden, instead of using the accommodation, we'll leave that as an option, but we're also just going to create a broader

exemption."

And our second argument is that, as I just alluded to, under the logic of *Hobby Lobby*, there is an additional substantial burden on different entities to participate in the accommodation process, and the final rules are an appropriate response to alleviate that substantial burden.

THE COURT: What's that substantial burden?

MS. KOPPLIN: So this would be on entities who believe that participating in the accommodation process is a violation of their religion. And *Hobby Lobby* said that the substantiality, at least, is not in question. Once it's established that their religious beliefs have been violated, we know it's a substantial burden because the burden is this threat of penalties under the ACA, that, as the Court noted in *Hobby Lobby*, it's an easy call that's substantial because the magnitude of the penalties is just so large.

THE COURT: So this is under the paradigm of them filling out the form and sending it in to HHS?

MS. KOPPLIN: Correct.

THE COURT: Okay.

MS. KOPPLIN: So that's the two ways that we've structured this.

And to go further, the agencies correctly concluded in their rules that the accommodation was not the least restrictive means of serving any compelling government

interest, and they lay this out at some length. But the short version is that it's hard to show a compelling interest when there's already many other exemptions. And there were already a number of entities that did not have to provide contraception, so there's all of the grandfathered plans, which is, I think, about 25 million people when the ACA was enacted, is the other past exemptions for churches and their integrated auxiliaries, there's the accommodation, and to weigh against that, there's the fact that many women do have access to contraception through other sources, through perhaps someone else's plan, parents' plan, their spouse's plan, through a state, federal, or local program or perhaps even if they happen to have an employer who objects, their employer may not object to the contraception that they want.

Most objecting employers -- well, I guess, many objecting employers only object to some of the methods. So, for example, here, I think there's only a handful that Notre Dame objects to, and the others they don't object to.

So in light of that, the agencies re-evaluated the administrative record and concluded that there was no reason to believe that the accommodation was the least restrictive means of serving a compelling government interest.

And furthermore, I mean, as we pointed out in our briefing, the government here is not taking the position that it is a compelling government interest, and we're not aware of

cases where Courts have sort of told the government what their interest was over the government's objection.

Once a burden has been established, RFRA doesn't prescribe the precise remedy that the agencies have to take to fix that burden. So RFRA -- the agencies here chose to put in place the accommodation first in the prior exemption, but there's nothing that told them in RFRA they had to do that specific thing.

And, in fact, that choice led them into a long morass and decades of litigation, which is how we're still here today. We've been here for years. We are still here today. Our position is that's why the agencies should be entitled to a little bit of leeway, instead of being told under RFRA there's one exact thing you can do in RFRA, you have to hit that bullseye, or otherwise you have to just keep incrementing one step at a time and getting sued every step and one day finally the Court will tell you, "Okay. This is the exact magic step where you can stop."

I mean, it's our position that the agencies should be able to short-circuit that process by saying, "Okay. Look, we know this was a substantial burden. Here is our reasonable approach to solving that. Even if it wasn't the one exact path that was preordained, this is something we should have the leeway to do to try and help people have the substantial burdens alleviated."

Unless there's further questions about RFRA, I would like

to address plaintiffs' constitutional claims.

THE COURT: Sure.

MS. KOPPLIN: So just briefly, starting with the Establishment Clause, plaintiffs appear to be arguing that the final rules in the settlement agreement, to some extent, establish religion. That's just not the case. There's numerous Supreme Court cases that state that there's room in between the Establishment Clause and the Free Exercise Clause where the government can accommodate religion.

And we think this is a lot like the *Amos* case where the government found that it was okay to exempt religious employers from Title VII restrictions on hiring and firing and that that was just going to be alleviating a government burden on the employers and not entangling the government in religion.

So similarly here, the government is not affirmatively directing anyone to do anything. Instead it's just alleviating a burden on some of these employers and letting them go ahead and act in accordance with their religious beliefs. So for all the same reasons that applied in *Amos*, this would satisfy the *Lemon v. Kurtzman* test and not violate the Establishment Clause.

In addition, on due process, plaintiffs make two arguments, one about the fundamental right to access contraceptives and one about a liberty interest. But they both fail for the same reason, and that's that there's not a

constitutionally protected interest in receiving employer subsidized contraceptives.

The Court wrote about this extensively in *Harris v. McRae*, and it said there's a difference between not subsidizing and preventing access. Nothing in the final rules punishes anyone for using contraceptives. Nothing prevents people from obtaining contraceptives. It just says, "We used to require a large group of people to subsidize contraceptives. Now we've made that group slightly smaller."

THE COURT: Why were the students cut out of the settlement discussion?

MS. KOPPLIN: I'm not sure, Your Honor. Again, I don't have much knowledge about that. Plaintiffs made an argument that this sort of is an additional reason the settlement agreement is void; and as we noted in our briefing, if you read the cases they cite, those cases actually say you can't dispose of the claims of a third party and you can't have a legally binding effect on a third party through a settlement agreement. But, obviously, neither of those things happened here.

The settlement agreement doesn't change anything about whatever claims plaintiffs might have. They, in this lawsuit, are bringing some claims; and if they wanted to bring other claims in other lawsuits, the settlement agreement doesn't stop them. The settlement agreement just says the agencies are not

going to take enforcement action in these categories. So it's certainly not the case the settlement agreement has bound the plaintiffs.

THE COURT: Does the settlement agreement prevent the students from -- were the students' rights impacted by the settlement agreement?

MS. KOPPLIN: Not to my understanding, Your Honor. Any claims they may have had that they wanted to bring through private enforcement, they could still bring through private enforcement. The settlement agreement is just the government saying, "We're not going to take government enforcement action on these topics."

THE COURT: Against Notre Dame and the other --

MS. KOPPLIN: Right, and the other parties that were signatories to the agreement.

Finally, on equal protection, plaintiffs can't show there's any facial discrimination against women. Obviously, the text of the final rules is written in terms of whether or not the employers have religious objections, not the sex of any individuals. And if there was any distinction based on sex, it seems like it would actually go all the way back up to the ACA here, which is where the women's health mandate came from.

Plaintiffs instead seem to be kind of arguing a disparate impact theory, that this is something that will have an effect on women because women are the ones who use contraceptives.

But in order to win on that theory, they would have to show purposeful discrimination which they just can't do. So in the absence of any facial discrimination, we think rational basis review applies, and certainly the agencies here had a rational reason in order to alleviate the substantial burdens on religious exercise to take this action. And we also think that even if intermediate scrutiny did apply, which it doesn't, but that would also be satisfied because the accommodation of religious beliefs is an important government interest which the Supreme Court recognized in *Cutter*.

So unless you have any further questions, Your Honor, then I would just respectfully ask that you dismiss the claims as to the federal defendants.

THE COURT: All right. Thank you.

Ms. Tanner, am I going to hear from you first? Or Ms. Banker, I'm sorry.

MS. BANKER: Good morning, Your Honor.

THE COURT: Good morning.

MS. BANKER: My name is Michelle Banker arguing for the plaintiffs. I will be covering the jurisdictional and other threshold issues in this case. I will be covering the illegality of the settlement agreement and our procedural APA claim against the rules. My colleague Alison will be covering our substantive APA challenge to the rules and our constitutional claims.

Your Honor, the settlement at issue is both reviewable and it is unlawful. It is different in kind than the settlements that the Court usually sees in the ordinary course of litigation for three reasons.

First, although defendants have said on multiple occasions that the settlement is simply a promise not to enforce the ACA's contraceptive coverage requirement, that is a mischaracterization of what the settlement --

THE COURT: Because it is future, prospective, right?

MS. BANKER: Exactly. And I think, Your Honor, it might actually be helpful for us to read a couple passages from what the settlement agreement actually says.

THE COURT: I have it in front of me here. What page are you on?

MS. BANKER: Sure. Well, I have it by paragraph.

THE COURT: That's fine. You can just tell me the paragraph.

MS. BANKER: Okay. So if you take a look at paragraph 2.

It says, "The government will treat plaintiffs and their health plans, including their insurance issuers and/or third-party administrators in connection with those plans, as exempt from the regulations or any materially similar regulation or agency policy."

Skipping to 2E, Your Honor.

It says, "No person may receive the objectionable coverage" -- meaning contraceptive coverage -- "as an automatic consequence of enrollment in any health plan sponsored by plaintiffs."

And just looking also at 2B.

"If the objectionable coverage is provided, it may not be provided as part of any plan sponsored by plaintiffs."

Your Honor, this is not merely a promise not to enforce. It is a statement that Notre Dame is exempt from the contraceptive coverage requirement.

THE COURT: But how is that any different than the paradigm under the accommodation? I mean, my understanding when we dealt with this, I don't know, five, six years ago and had three days to write a 30-page opinion, my impression was that the provision of contraceptive services was totally separate from Notre Dame and that it was the third-party administrator that procured it on behalf of the students. And so isn't that sort of just stating the same thing?

MS. BANKER: Your Honor, this agreement is basically saying that even though that is the case, that previously it was the third-party administrator and the insurance issuer that were coming in and providing separate payments to the Notre Dame students, this is saying that Notre Dame can even block their plans from doing that.

THE COURT: How is that saying that?

MS. BANKER: Because it's saying that "...will treat plaintiffs and their health plans, including their insurance issuers or third-party administrators, as exempt from the regulations or any materially similar regulation or agency policy."

So what they have done is they have invoked this agreement as saying, "We can tell our plans that they cannot provide these separate payments that they were otherwise providing under the accommodation to our students. And as a result of that, our clients, Notre Dame students and the 17,000 people on these plans, no longer have access to contraceptive coverage without cost-sharing as required under the ACA." They have decided that this means they can no longer comply, and as a result, the TPA and the insurance issuer isn't providing those separate payments any longer.

THE COURT: So are you saying, let's say, in 2021 there's new rules --

MS. BANKER: Uh-huh.

THE COURT: -- that this would inoculate Notre Dame from complying with those new rules should they ever go into --

MS. BANKER: Yes. I mean, that is what -- not even rules. This purports to exempt them from any materially similar regulation or agency policy. It even seems -- purports -- points to say that future laws -- I mean, even laws of Congress, perhaps, which is clearly something the agency

can't do, cannot require Notre Dame to provide contraceptive coverage. It's an affirmative statement that they don't need to provide contraceptive coverage forever.

This is not merely a promise not to enforce the ACA. It is something entirely and wholly different, and so that is the first reason, Your Honor, that this isn't an ordinary nonenforcement decision.

Your Honor, there's a second major reason why this is not an ordinary nonenforcement decision subject to *Heckler*.

Excuse me. I'm going to grab some water.

THE COURT: Sure.

Ms. Banker, can I get you to slow down too.

MS. BANKER: Sorry about that.

THE COURT: It's very difficult for my court reporter -- all of you guys. It's very, very difficult for her to try to process this, and for me to try to process this too.

MS. BANKER: Sure. Sorry, Your Honor.

So the second reason why *Heckler* does not govern this case is because this settlement is one of a series of agency actions taken to attempt to undermine the ACA's contraceptive coverage requirement, and I think it would be helpful to give a brief timeline of events to give the context for what is actually going on here.

So in October of 2017, the agencies issue the interim final rules. Although the defendants say that this is only

going to affect .1 percent of people and that this is a tiny, tiny exemption, that is an absolute mischaracterization of what these rules do. They are the exemption that swallows the rule, and this is why I believe the California Courts said these turn the contraceptive requirement from a legal entitlement to an essentially gratuitous benefit.

By the department's own estimates, hundreds of thousands of people will be affected by these rules. And there's no mechanism for oversight to prevent abuse. They truly are the exemptions that swallow the rules whole. So that was their first step.

Then just days later, the department's executed settlement agreements with Notre Dame, and we know that at least with 97 other entities, plus, unknown affiliated entities. This includes the one instrument with Notre Dame and 73 other entities. Plus we know of at least 20-odd other settlement agreements, and we strongly suspect that there are others out there.

THE COURT: Why were these secret?

MS. BANKER: There were intervenors, student intervenors in these cases, at least in the Notre Dame case, that were not included in the settlement negotiations, and the case was just dismissed on Rule 41 dismissal. They were not included in that process.

THE COURT: I remember in October of '17, I wondered,

"What's going on with this case," and it just kind of disappeared.

MS. BANKER: That's right. That's right, Your Honor.

And I will also say that there's another thing the government said that is just not correct.

This agreement, it absolutely does extinguish the claims of the Notre Dame students who are impacted by this. By this agreement, it says that Notre Dame is exempt. This isn't just saying the government will not enforce. This is saying Notre Dame is exempt from the contraceptive coverage requirement or any similar law or regulation.

And so what that means is that as long as this agreement exists, it stands between my clients and any private enforcement action, whether that be through ERISA to a state insurance commissioner, any way that they might have to try to enforce this right, this agreement now stands between them. It absolutely impermissibly trades away the rights of third parties. It is not merely an agreement not to enforce, and for this reason, it is not subject to *Heckler* discretion.

Your Honor, two circuit courts have already held that a settlement agreement that violates the law is reviewable under the APA. This is the Fourth in *Executive Business Media* and the Ninth Circuit in *Carpenter*. The defendants try to distinguish this case by trying to fit it into these cases, by trying to fit it into *Heckler*'s law to apply exception.

Notably, actually, Notre Dame brings this up but the government doesn't.

And the fact of the matter is, is that neither of those cases mention *Heckler*, neither of those cases tried to fit it into the law to apply exception. They said, rightly, when an agency action --

THE COURT: What do you mean by "law to apply exception"?

MS. BANKER: Sure. Sure. Sure.

So there is one exception to *Heckler* that exists that says if the statutes kind of very specifically tell the agencies how to enforce the law, then that could be one of the several exceptions to *Heckler*.

But this isn't something -- these cases were wholly outside of the *Heckler* decision and even though they were decided after *Heckler*, and for good reason. Because when agency action violates the law, even if it just takes the form of a settlement agreement, that is reviewable by a Court. Two circuit courts have already held so, so can this Court.

The last point I would like to make, Your Honor -- and actually, I want to take a step back and talk a little bit more about the timeline of events we were discussing before.

So an honest general policy point -- so they executed these settlement agreements with dozens of entities, including Notre Dame, and we don't know how many others. A few months

later, in addition to this, they began filing briefs refusing to substantively defend the Affordable Care Act's Birth Control Benefit in legal challenges. As of July 2018, we know of at least 13 cases where they filed briefs -- by "they," meaning the federal defendants -- filed briefs throwing up their hands and saying, "We're not going to defend this on the merits."

Finally, in November of 2018, the federal defendants finalized the interim final rules in -- as final rules that were, essentially, identical.

So, Your Honor, *Heckler* doesn't apply, A, because this isn't a promise not to enforce, but, B, because this is the extreme case that the Supreme Court contemplated when it decided *Heckler* in footnote four of that decision where they said that *Heckler* would not apply where the federal defendants or agencies have consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.

That's what's happening here, Your Honor, that's what this timeline of events shows. The administration is refusing to enforce the contraceptive coverage requirement against anyone, and I will note that federal defendants have not pointed to a single case where they have enforced the contraceptive coverage requirement.

THE COURT: I understand, and I'm sympathetic. But I don't -- you keep saying the contraceptive requirement, but

what the ACA said was, "Come up with preventative care and then we're going to let the agency decide what that means." And they used to agree with you, but they don't agree with you anymore.

MS. BANKER: Sure. And I will say, Your Honor, my colleague, Alison, is prepared to talk at length about the substantive issues behind what the ACA requires and not.

But simply that, as you mentioned before, what the statute does is it provides for, you know, coverage of preventive services as required by HRSA. And HRSA has not changed the list of services that are to be included in it. All the statute gives discretion to the agencies to do is to prescribe what may be covered but not who may be covered. And, again, I will let my colleague talk in more detail about that.

So, Your Honor, we're in a situation where they have -- the federal defendants have not enforced the contraceptive coverage requirement against anybody. They haven't pointed to a single case where they're doing this. Instead they've effectuated this general policy to undermine the ACA by issuing the rules, refusing to defend litigation, and as relevant to this case, by settling out litigation.

The rules and the settlement were executed just one week apart. They are a belt and suspenders of the unlawful scheme that's going on here, and a settlement agreement is simply the document that effectuates this general policy as to Notre Dame

and to Notre Dame students and to my clients.

Your Honor, the federal defendants should not be allowed to inoculate themselves from judicial review by effectuating their general policy through multiple piecemeal settlement agreements and then calling them individual nonenforcement decisions. Agencies are obligated by the constitution to take care that the laws are faithfully executed, not to undermine those laws.

This extreme position would allow the Executive to usurp the legislative function by decline to following the law as Congress enacted it, and that's just simply not how our government works. It is a perversion of basic principals of separation of powers. And it is certainly not what the Supreme Court decided when -- or contemplated when it decided *Heckler v. Chaney*.

And finally, Your Honor, on the question of *Heckler*, even if *Heckler* -- if the Court determines that *Heckler* applies, it would not preclude the Court from reviewing agency action that violates the constitution. *Heckler* interpreted the committed-to-agency-discretion-by-law exception to the APA but violating constitutional mandates cannot be committed to agency discretion nor can the APA, a statutory provision, constrain review of constitutional claims.

And the *Heckler* Court itself recognized this. Both the majority and Justice Brennan in concurrence recognized that the

majority's holding did not reach claims that the agency violated constitutional rights.

And as my colleague, Alison, will discuss, the settlement agreement violates both the Establishment Clause and the due process and equal protection guarantees of the Fifth Amendment --

THE COURT: How come nobody else challenged this settlement agreement, all these other colleagues and universities that settled with the government -- and I drew the short straw I guess -- and so what's going on with that? It does strike me that that makes this a little novel.

MS. BANKER: Yeah. And I would say, quite frankly, Your Honor, I don't know that a lot of people know what's going on. We found out about the settlement agreement through a FOIA request because one day our students' coverage changed and we didn't know why and the University president mentioned in a press release a favorable settlement with the administration.

THE COURT: That's literally how you found out?

MS. BANKER: Yes, sir. Yes, Your Honor.

So in the end, Your Honor, I will just say that agencies literally have no power to act, except as Congress permits, and for this reason the settlement agreement is reviewable, and it cannot survive judicial scrutiny.

THE COURT: Why should I -- I mean, this settlement agreement issue is kind of a quagmire. You have to win on both

issues, right? You have to both show that the rules were promulgated in violation of the APA and that the settlement agreement is illegal in some way.

Why should I not just shelf this until this kind of gets worked out way above my pay grade on the rules part of this?

MS. BANKER: Well -- so, Your Honor, I would say that with respect to the settlement agreement, my clients are experiencing harms right now. They are currently paying for their birth control when --

THE COURT: Yeah, but I -- unless -- if the rules remain as promulgated, that's going to continue to occur.

MS. BANKER: Well, so right now several courts have issued preliminary injunctions on these rules, and if things -- and they have also said that the rules are not likely to stand, right. So if we are waiting on the Supreme Court to decide the legality of the rules, we're talking June 2020 at the earliest for the possibility that these rules will be allowed to stand, notwithstanding the fact that the Courts who have considered them already have said that they are likely to be vacated.

And so my clients will have to wait for, what, a year-plus for a determination of their rights, and meanwhile they are being harmed currently. And so I think this is a very ripe controversy absolutely --

THE COURT: I'm not saying it's not a ripe controversy, but I was, in some respects, surprised to see that

you all did not ask for a preliminary injunction.

MS. BANKER: Yes, Your Honor.

THE COURT: Is that a tactical decision to avoid, sort of, a fire drill kind of problem? Can you speak to that?

MS. BANKER: Sure.

Ultimately, Your Honor, our clients are students. Students tend to graduate and move on, so cases can be held up thru the preliminary injunction process and not reach final -- you know, final judgment, and so we wanted to just move the case forward rather than going through that process and seeking a PI.

THE COURT: I'm grateful.

MS. BANKER: Thank you, Your Honor.

And with respect to this argument on standing and ripeness, I do want to point out that Notre Dame points to the existence of the rules to contend that plaintiffs can't challenge the settlement while plaintiffs -- where the federal defendants point to the existence of the settlement to say the plaintiffs can't challenge the rules. The law doesn't leave plaintiffs in this catch-22.

As Notre Dame admits in its reply papers, its refusal to provide coverage is based on both the regulatory exemption and the settlement agreement. And these are simultaneous and independent causes of plaintiffs' harm they are experiencing right now.

And as we discussed before, absent the rules and the settlement, plaintiffs would have contraceptive coverage through the preexisting accommodation process, and so the only way to get complete relief is for the Court to remove both of the impediments of them accessing coverage.

THE COURT: What would be the remedy here on the settlement agreement? Like, what would I do, enjoin its enforcement?

MS. BANKER: Yes, that's right. Our contention is that the settlement agreement between Notre Dame and the federal defendants is void, and it's void for illegality. It's void *ab initio*. And, yes, absolutely, and to vacate the rules, Your Honor.

THE COURT: I mean, I understand the rules --

MS. BANKER: Right.

THE COURT: -- that seems a little more inside the box, and it's still a difficult question. But the idea that some judge sitting in Hammond is just going to tell, you know, the Attorney General that they can't settle a lawsuit, that gives me some discomfort.

MS. BANKER: I would suggest Your Honor take a look at the cases *Executive Business Media* and *Carpenter*. And these are both cases that squarely addressed the Department of Justice's authority to settle litigation, and it said that this authority stops at the walls of illegality. If I may just read

to you some language from these cases.

Executive Business Media, which is 3 F.3d 759, Fourth Circuit, 1993. "We think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality."

In *United States v. Carpenter*, 526 F.3d 1237, Ninth Circuit, 2008. "While it is true that the Attorney General has plenary discretion to settle litigation to which the federal government is a party, a decision that is discretionary is not rendered unreviewable in all circumstances. Rather, where an action is committed to absolute agency discretion by law, Courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations."

There's precedent to do this, Your Honor. The Court may do this as well.

THE COURT: Is there any discovery that would have to be taken in this case?

MS. BANKER: I think we would need to see the administrative record that the federal defendants put forward, but we do have constitutional claims, Your Honor, that could be helpful -- that we may need discovery on going forward.

THE COURT: Right. So in some respects isn't it -- I

mean, if you're looking for a quick ruling, isn't it in many ways to your benefit that I grant their motions and you get it up to the circuit so that they can decide it more quickly? Whereas, if I agree with you and I deny their motion to dismiss, this is just going to languish in litigation for another year, two years, however long it is to take discovery, do summary judgment, et cetera.

MS. BANKER: I disagree, Your Honor. I think there's a chance if you dismiss this motion this would be appealed. That appeal would be remanded back to this Court to reach final judgment. It would take even longer than if you were --

THE COURT: How would they appeal?

MS. BANKER: I'm sorry. We would appeal.

THE COURT: Right.

MS. BANKER: We would appeal. And then ultimately win and then come back and then we would have to go through the process of reaching final judgment. Your Honor, respectfully, if you deny their motion, we will move quickly to move forward to reach final judgment in this case.

Your Honor, a couple other things unless you have further questions on the reviewability.

THE COURT: (No audible response.)

MS. BANKER: Court's indulgence. One second.

The federal defendants raised an argument about privity of contract for the first time in their reply papers that I would

like to address with the Court right now.

Because it was raised for the first time on reply, it should be deemed waived; but in any event, the cases upon which the federal defendants rely concern a suit to enforce a contract where the Tucker Act typically supplies the waiver of sovereign immunity. But the question of whether a contract should be enforced is entirely separate from the question posed in this case which is whether a contract is unlawful and thus should be deemed void for illegality.

Such a question is not founded upon a contract, which is the phrase for which the Tucker Act typically supplies waiver of sovereign immunity. Instead it is a legal claim and the waiver of sovereign immunity is supplied by the APA. And because it a legal claim, the privity requirement is not applicable.

For this reason, it is not surprising that in the *Executive Business Media* case and *Carpenter* case that I just read for you, third parties challenged a settlement agreement with the government and privity was not an obstacle.

Your Honor, turning to the substantive illegality of the settlement agreement. We have already touched on several reasons why the agreement is unlawful, but I just want to make clear that the agreement is unlawful, in part, because it creates this blanket exemption from the Affordable Care Act that -- as my colleague will discuss -- is not authorized by

the Affordable Care Act but also because the Supreme Court has made clear in this case, *Local 93*, that parties who chose to resolve litigation through settlement may not dispose of the claims of a third party and may not impose duties or obligations on a third party without that party's agreements.

Again, the federal government has said that hasn't happened here, and we completely disagree. Our view is that this agreement will extinguish the ability of our clients to privately enforce their right to contraceptive coverage through either ERISA or some other mechanism. As long as this agreement exists, it stands as an impediment to them being able to enjoy the benefits of the right they are entitled to by law.

Second, the settlement defies the Supreme Court's unambiguous instruction in *Zubik* and in Notre Dame's own case to resolve legal challenges to the contraceptive coverage requirement in a manner that accommodates the religious exercise while at the same time ensuring -- ensuring that women covered by the entity's health plans receive full and equal health coverage, including contraceptive coverage.

This is not merely a suggestion. It is a direction. That whatever resolutions defendants reached, it was required to ensure that plaintiffs received the coverage they are entitled to by the ACA.

However, federal defendants have done just the opposite. They are allowing Notre Dame to block its students from

receiving coverage through the accommodation process.

Moreover, the settlement agreement is also illegal because it is trading away the constitutional rights of my clients in defiance of DOJ internal guidance. I will say to the point about raising new claims that we didn't plead, we knew DOJ internal guidance is simply like case law. It interprets the law as it exists. We're not bringing a new claim. We pled in the complaint that the settlement agreement violates the law, and the DOJ internal guidance that we are citing to is interpreting that law and why what is going on here is unlawful.

And so the ways that it's unlawful, as explained by this DOJ guidance, is that it trades away the constitutional rights of parties, which the Moss memo very specifically says agencies cannot do. And further, it purports to bind future administration. It cabins that future discretion which, again, as the Meese memo says, it's improper and is not what DOJ should be doing when it enters into settlement agreements.

And as my colleague Alison will discuss, because it also defies the ACA and is not authorized by RFRA and violates the Fifth and First Amendments of the constitution, it is illegal for those reasons as well.

Unless Your Honor has any further questions on the settlement illegality, I would be happy to turn to the procedural APA claim now.

THE COURT: Let's take about a 10-minute break before you do.

MS. BANKER: Okay. Thank you.

(A recess was had at 11:20 a.m.)

(The following proceedings were held in open court beginning at 11:29 a.m., reported as follows:)

DEPUTY CLERK: All rise.

THE COURT: Ms. Banker, do you want to continue there?

MS. BANKER: Your Honor, before we get into the procedural APA claim, I did want to make a point about the *Deotte* case that opposing counsel raised.

So, yes, that was decided, I think, just last week. To be clear, this wasn't a nationwide injunction. It was a nationwide class. And the class members are as yet unspecified, but more importantly --

THE COURT: He certified a class?

MS. BANKER: He certified a class and issued an injunction on a class-wide basis.

So I think the most important thing to know is that class is for employers, and the student that we present in that case would not be covered by that injunction, number one.

Number two, the State of Nevada had tried to intervene in that lawsuit, and the intervention motion was just never granted. So at this point, I don't know what the next steps

are. I imagine there will be an appeal of some sort, so that case is yet to be sorted out. It is by no means a final determinant about what's going on in these cases.

THE COURT: This is an absolute mess, right? It's a mess.

MS. BANKER: There is a lot going on, Your Honor. There is a lot going on, but currently speaking, our clients are suffering concrete harms from what's going on.

THE COURT: It's very frustrating as a lower court judge to -- it just seems to me that it was the parties' obligation to force an answer from the Supreme Court.

MS. BANKER: That's right.

THE COURT: What's done is done, and instead we have this -- I don't understand it. Go ahead.

MS. BANKER: But instead what the government did is they settled all the cases and just stopped defending litigation entirely writ large, which is why we think this is just an abdication of their responsibility to enforce rather than undermine the Affordable Care Act.

THE COURT: Thinking they're buying peace in litigation and here they are in Indiana on another lawsuit.

MS. BANKER: Right.

THE COURT: And probably more to come.

MS. BANKER: And that goes to show that this wasn't a discretionary decision of allocating resources in this or that

litigation. They just didn't defend at all.

THE COURT REPORTER: I'm sorry. You need to please slow down.

THE COURT: Yeah. I mean, all of you guys, you speak so fast it's very hard -- you guys understand this stuff so much better than we do. And, you know, trying to process this, it's hard. It really is.

MS. BANKER: My apologies. I'm a fast talker anyway, so I will slow down.

So turning to the procedural APA claim. Federal defendants issued the rules initially as procedurally defective interim final rules and then this error infected the final rules as well. And this is under the standard set forth by the D.C. Circuit. Notwithstanding what federal defendants claim, the solicitation of post-promulgation comments does not cure this defect.

First, the interim final rules could only have been issued where Congress had expressly stated that the APA was inapplicable or where there was good cause, which is a very narrow exception. It applies to limited emergency situations or routine and inconsequential rules and every Court to consider the issue, including the Ninth Circuit, the Northern District of California, and the Eastern District of Pennsylvania twice, have held that federal defendant's issuance of rules of IFRs failed this test. There was no emergency, and

the significant public outcry over these rules really illustrates that they are anything but routine.

In addition, the Eastern District of Pennsylvania recently held that the final rules are also procedurally infirm, notwithstanding the solicitation of post-promulgation comments. The Eastern District of Pennsylvania held that "The failure to comply with the APA's notice and comment requirements when issuing the IFRs fatally tainted the final rules such that the issuance of the final rules violated the APA."

And this is under a standard that the D.C. Circuit has consistently reiterated, which is that when an agency foregoes notice and comment the resulting rules are presumed invalid. The presumption can only be rebutted if the government -- not the plaintiffs -- if the government makes a compelling showing that it has kept an open mind. The burden is on the government and not on the plaintiffs.

The Third Circuit has also held, as the Eastern District of Pennsylvania phrased it, that "There is a deep skepticism towards the curative powers of post-promulgation notice and comment procedures." And in that circuit, the presumption of invalidity simply cannot be rebutted. In other words, post-promulgation comments cannot cure the initial procedural defect.

Your Honor, the federal defendants have discussed a case in the Seventh Circuit that is entirely inapposite. The

Seventh Circuit has not addressed whether an agency's solicitation of post-promulgation comments after issuing an interim final rule that failed to comport with the APA's notice and comment requirements can cure the APA violation. The single case they rely on is inapposite because it involved a very particular provision of the Clean Air Act in which Congress explicitly shifted the burden onto the plaintiffs to prove that the regulation at issue would have been substantively different had the EPA engaged in notice and comment.

So they changed it from requiring the government to show an open mind to requiring the plaintiffs to show actual prejudice, which is an entirely different standard. No similar provision is at play here.

So under the APA, at best, the government has the burden of proving that it's mind remained open. At worse, solicitation of post-promulgation comments simply cannot cure the procedural defect at all. Here the plaintiffs have actually --

THE COURT: What would they do in the case where they screw up and so there's a defect in the procedure? What are they supposed to do? How do they address that?

MS. BANKER: Sure.

The way they could have done it here, but they didn't, is to invalidate the IFRs, issue a new notice of proposed rule

making, and go to the comment process.

THE COURT: But isn't that what they did to get to the final rules?

MS. BANKER: No, they kept the interim final rules in effect, but so egregiously, after doing that, they took actions immediately thereafter to entrench their policy decision. In fact, rather than keeping an open mind, they started executing settlement agreements relying on and further entrenching the rules just starting a week afterwards, a week after promulgating the interim final rules.

They refused to defend litigation challenging the ACA contraceptive coverage requirement in court while they vigorously defended the IFRs at the same exact time they were purporting to consider comments on those rules. In addition, they started the process of implementing the forms for the new optional accommodation.

And so, Your Honor, even though the plaintiffs don't have the burden, even though the burden is on the government to keep an open mind, we actually have a lot of evidence here that they did not have an open mind. All of these things which we have pled in the complaint show that.

The policy reasons behind this are strong because if agencies can cure their procedural APA violations by issuing rules first and then seeking comments later, the exception will swallow the rule and the APA's notice and comment requirement

becomes meaningless. It's precisely to prevent agencies from acting first and thinking later that these requirements exist.

And, you know, this is exactly some of the policy reasons animating the Court's decision in Pennsylvania to say, "No, these final rules were procedurally ineffective. They are also infirm because the interim final rules were also infirm."

In fact, I think a quote from the Pennsylvania Court is a little bit helpful. What they said is that "Participants are less likely to influence agency action in later stages of the agency decision-making process and this is especially the case where an agency has already issued interim final rules which suggests it has decided what federal policy should be. Post-issuance commentary does not ameliorate the need for notice and comment because by the time agencies issue interim rules they are less likely to head to public input. Last, permitting post-issuance commentary carte blanche would write the notice and comments out of the APA."

Your Honor, unquestionably federal defendant's mind was made up, and it's unsurprising then that the rules are materially and functionally the same. Accordingly, as the Eastern District of Pennsylvania already held, the final rules are fatally tainted by the IFR's procedural infirmities and must be set aside.

Your Honor, I will just finish by saying that the settlement agreement is both reviewable and it is unlawful and

the final rules are procedurally infirm. And my colleague, Alison, will explain more why the rules are also substantively unlawful and violate the constitution.

THE COURT: Thank you. Thanks, Ms. Banker.

MS. BANKER: Thank you, Your Honor.

THE COURT: Ms. Tanner.

MS. TANNER: Good morning, Your Honor. Alison Tanner for plaintiffs.

As previously explained, I will be addressing the subjective APA violations and the constitutional claims here.

Now, federal defendants have traded away the plaintiffs' rights and have done so in excess of their statutory authority, arbitrarily and capriciously, and in violation of federal law and the constitution.

Turning first to plaintiffs' subjective APA claims. We're treading little new ground here, Your Honor. Two federal district courts have already held that the plaintiffs' states [verbatim] are likely to succeed on the merits of their claim that federal defendants did not have the authority, either under the ACA or RFRA, to create these rules.

First, the defendants' proposed interpretation of the ACA is simply outside of the universe of *Chevron* because what they are interpreting here, or proposing to interpret, was not delegated to them. Both of the federal district court decisions already decided here have rested on a fundamental

principle of administrative law which is that federal agencies do not have the authority to act unless and until they are conferred the power to do so by Congress. And both of those courts held that the ACA specifically designates who must provide the comprehensive women's preventative healthcare services, and nowhere in the ACA does it delegate to the agencies any authority to create exemptions from the clearly defined category.

So if we look at the ACA itself, it says that all nongrandfathered group health plans and health insurance issuers shall provide coverage for comprehensive women's health services as provided for in comprehensive guidelines created by HRSA. And so that speaks plainly that the category of who must provide is all nongrandfathered group health plans and health insurance issuers. And when a federal law creates the authority to give meaning to what is occurring here, what constitutes women's preventative healthcare, it does not typically grant authority to create exemptions from those laws.

And so what HRSA did is they filled in the blank of what women's preventative healthcare, was and then now with these rules, HHS is trying to carve out who. But there is simply nothing in the statute that grants them the authorization to do so.

The federal agencies are --

THE COURT: But this can't be any broader than what

they are asking HHS to do. I mean, the language of the statute, not surprisingly, is extremely broad; and they are delegating to HHS to put the details in there. Why is that not implicit in that that exemption could exist?

MS. TANNER: The language of the statute delegates to HRSA the authority to determine broadly what constitutes women's preventative healthcare, what is necessary, and HRSA identified 10 different services that were essential. But the statute is not broad in terms of who must provide that insurance coverage. That is clear within the statute; it is all nongrandfathered group health plans and health insurance issuers. There's nothing within there that suggests that the agencies have the authority to create new exemptions there.

And, Your Honor, defendants try to stretch this phrase within the statute "as provided for" to give them the authority to grant these exemptions. But this interpretation deserves no deference because it is contrary to the plain meaning of that phrase within the context of this statute because here in this particular subsection of the preventive health services statute, uniquely, here, the comprehensive guidelines simply have not been created yet. And so "as provided for" means nothing more than the comprehensive guidelines would be provided at a later date by HRSA.

To sharpen this point, I can provide you with a hypothetical. Imagine that Congress created a statute that

says, "All cars must have seat belts that meet certain specifications, including any additional specifications as provided for in guidelines drafted by the seat belt safety administration."

So if the seat belt safety administration issued guidelines that exempted red cars, that would not plausibly be an exercise of the authority delegated to them by Congress. Rather, that would be the seat belt safety administration replacing their judgment for Congress's judgment that all cars, red cars, green cars, and blue cars must include safe seat belts. That's exactly what's occurring here, Your Honor.

Now, defendants attempt to point to a myriad of other textual inferences in order to construct statutory authority under the ACA, but this runs counter to yet another important principle of administrative law, which is that Congress knows how to speak plainly. If Congress had intended to grant the agencies here the authority to create exemptions under the ACA, it simply would have said so, but it did not.

Further, Your Honor, even if the agencies were granted somehow under the ACA the authority to create exemptions --

THE COURT: So was it permissible for them to create exemptions for churches?

MS. TANNER: Your Honor, the exemptions for churches are wholly different.

THE COURT: I understand that, but if I accept you at

face value, even that would have been improper.

MS. TANNER: Rather, Your Honor, as the agencies addressed in the Federal Register announcing the church exemption, their justification there was based on the special constitutional protections that are provided to churches to prevent governmental interference with their internal governance. And that's why --

THE COURT: This is just a cousin of that?

MS. TANNER: Rather, Your Honor --

THE COURT: Go ahead.

MS. TANNER: I'm so sorry.

The agencies here do not suggest that they have constitutional authority to create these. They cite to two specific statutes, the ACA and RFRA, and that's why the church exemption is wholly of a different kind. The authority there is through that special protection provided under both of the religion clauses. And plaintiffs' claims here will simply have no effect on the constitutional rights of churches.

THE COURT: No, I understand that. My point is that if I accept you at face value, then it would have been improper for them to even come up with a church exemption.

MS. TANNER: That, again, is not what plaintiffs are arguing because there is this separate -- wholly separate authority which is the doctrine of constitutional law as shown in *Amos*.

THE COURT: I thought it's RFRA that led to the church exemption.

MS. TANNER: No, Your Honor, that is simply not what the government's position was up until this series of litigation. You can look to -- and I believe it is cited in our brief -- but the actual Federal Register announcement in 2011 for the church exemption does not claim any authority under RFRA. Rather, it looks specifically to these constitutional concerns.

Further, Your Honor, I would just note that the church exemption applies to all houses of worship and not just to those that have religious objections to contraception, and that's how we know, also, that RFRA is not the authority for it because RFRA only applies to, you know, religious objectors with a substantial burden on their religious exercise, as I will turn to shortly.

Moving back, I just want to address that the exemptions here are contrary to the purpose of the Women's Health Amendment, which is the amendment that is at issue today. So when the Women's Health Amendment was passed by Congress, their specific purpose was to ensure that women were not paying more out of pocket than men for healthcare as they had prior to the ACA.

But as the Northern District of California has already held, the exemptions here transform the contraceptive coverage

requirement from a legal entitlement to a wholly gratuitous benefit that is subject to an employer's discretion and thus puts women back in that unequal position. And we should look specifically to what Notre Dame has done here, which I don't believe has been mentioned yet, Your Honor.

Notre Dame says it objects to certain types of IUDs and the emergency contraception, and, therefore, those are wholly not covered by their plan. But, additionally, Your Honor, Notre Dame has imposed a copayment for all other forms of contraception. This runs counter to the express commands of the ACA that there not be any cost-sharing requirements for preventive women's health services, but Notre Dame, under the settlement agreement -- and, I mean, they haven't really explained the source of authority for this -- they are imposing copayments on women in contravention of the Women's Health Amendment.

Also it's important to note because the two other district courts have addressed this issue, found it compelling, that Congress considered sweeping exemptions from the ACA and rejected those exemptions. That was discussed in *Hobby Lobby* at footnote 30, so Congress already considered the issue of whether to grant religious exemptions here and refused to do so. So here the federal agencies have replaced their judgment for Congress's.

Now, turning to RFRA, Your Honor. RFRA does not authorize

much less require these rules. RFRA's statutory protections are only triggered when its prerequisite has been met. So, first, the government must have imposed a substantial burden on religious exercise.

And looking to the text of the interim final rules, the final rules, and the settlement agreement, the decision here to grant the religious exemptions was explicitly based on the federal agency's determination that the accommodation created a substantial burden. So that's in paragraph 4 of the settlement agreement, in the IFRs that's at 47,800, and in the final rule that's at 57,546. That is their interpretation.

But as you well know, most federal courts to have considered whether the accommodation created a substantial burden held that it does not. And yet after these court victories, the agencies completely reversed their position and specifically premised the rules on their newfound conclusion that the accommodation violated RFRA. That conclusion is wrong, and it is not entitled to deference from this Court.

RFRA does not dedicate to any specific agency the interpretation of whether or not a burden is substantial. Rather, as the Seventh Circuit held in *Korte v. Sebelious*, which is one of those cases leading up to *Hobby Lobby*, and in that case the Seventh Circuit held that whether a burden is substantial is a legal question and RFRA specifically provides for judicial review.

And the government's legal conclusion here is wrong as a matter of law because the facts, Your Honor, simply have not changed since this Court first ruled on that issue in 2013. Since the Seventh Circuit's two decisions in *Notre Dame* I and II and since those eight -- or sorry -- seven other federal circuit courts of appeals decisions.

While the Supreme Court in *Zubik* vacated and remanded those decisions, it did not reverse the reasoning of those decisions or even attack the underlying reasoning. And, therefore, we think this Court should look to the Third Circuit's decision in a case called *Real Alternatives* that was post-*Zubik*. There, the Third Circuit reaffirmed its pre-*Zubik* decision in *Geneva College*, in which that Court agreed with this Court and the Seventh Circuit that the accommodation did not create a substantial burden.

And the Third Circuit specifically reasoned that because the vacating and remanding did not attack its earlier reasoning, that earlier reasoning was at the very least highly persuasive. And that is also what the Northern District of California concluded in its recent decision that RFRA did not authorize these rules. And so the facts have not changed and therefore Your Honor's reasoning should still hold.

The accommodation does not compel Notre Dame to modify its behavior in a way that is contrary to its religious beliefs but, rather, merely requires it to provide notice to its

third-party administrator and health insurance issuer of its desire not to cover contraceptives just as Notre Dame had done prior to the passage of the ACA.

Whether Notre Dame now characterizes the resulting contraceptive coverage that is required by law after that notification, the results of their "authorization," as they have said previously, are now as a result of the "hijacking" of their plan matters, not because the specific text of the regulation here, 45 CFR 147.131, states that the accommodation excludes contraception coverage from Notre Dame's group health plan. It requires the third-party administrator to segregate all of the premium revenue, and it requires that third-party administrator to provide separate notice of anything having to do with that contraceptive coverage.

Further, when --

THE COURT: Who pays for it?

MS. TANNER: So there's two processes at issue here because the employee -- or employer plan is self-insured so there the third-party administrator is the one who is paying. Whereas, with the student plan, that's through an Aetna plan and there Aetna gets reimbursement from the government.

THE COURT: Does the third-party administrator get reimbursement from the government?

MS. TANNER: The third-party administrator is --

THE COURT: In the self-funded plan situation.

MS. TANNER: Yeah. The third-party administrator receives money from the individual marketplace, and Your Honor's opinion in 2013 explains this very well.

THE COURT: Well, yeah, it was confusing though.

MS. TANNER: Yes.

THE COURT: I wasn't quite sure I had that right, frankly, to be candid about it. But I don't really understand the mechanics of how the third-party administrator is made whole without it having some impact on the underlying provider, in this case, Notre Dame.

MS. TANNER: The only thing relevant to the Court's analysis here is that it is in no way coming out of Notre Dame's pocket as provided.

THE COURT: Costless to them?

MS. TANNER: Yes, Your Honor.

And also when Notre Dame was complying with the accommodation, so prior to the 2018/2019 school year, those on the student plan would receive a wholly separate card for their contraceptive coverage, so they even, you know, had a different than from their regular Notre Dame health insurance plan, a way to receive that contraception coverage.

And as this Court previously held, it is simply not Notre Dame's prerogative to dictate based on its religious beliefs what healthcare services the government may require from third parties.

So Judge Posner's decision in *Notre Dame* I is particularly instructive here. He analogized it to a religious objector to war who is able to be -- is able to refuse to engage in fighting, but that religious objector is not able to block the government from then going ahead and selecting another individual to fight in his stead. This is because RFRA requires that an accommodation of certain religious beliefs does not mean that the accommodated can dictate how the government then achieves by substitute measures its overall aim.

Likewise, this is in line with the Supreme Court's decision in *Bowen v. Roe* in which the Supreme Court held that a Native American father was not entitled to dictate based on his religious objection how the government would use Social Security numbers in its internal administration.

So because there is no substantial burden here created by the accommodation process and -- meaning, that RFRA's statutory prerequisite simply has not been met -- there is no RFRA authorization, let alone requirement, for the religious exemptions here.

Therefore, the Court need not reach the compelling interest by least restrictive means analysis, but if it were to, the accommodation would pass that test. That is what the D.C. Circuit and Eleventh Circuit previously held. In the D.C. Circuit, that was *Priests for Life* and the Eleventh Circuit it

was *Eternal World Television Network*.

The defendant's assertion here that the federal agencies have the last say on what constitutes a compelling governmental interest simply cannot be abided because this would allow the federal agencies to say if they did not like or if they did not think a statutory regime was important they could refuse to enforce it no matter what Congress said, and this would simply grant outside authority to the federal agencies.

THE COURT: I understand these arguments.

Can you just briefly address the constitutional claims.

MS. TANNER: Absolutely, Your Honor.

THE COURT: I'm running out of time here.

MS. TANNER: Of course.

And I would just note that the compelling interest in addition to the, you know, women's equality is also in preventing the Establishment Clause violation that occurs under these rules which is forcing third parties to bear the harms of -- you should be very glad that you're telling me to skip over all of this -- that is forcing third parties to bear the harms of Notre Dame's religious beliefs.

So under the Establishment Clause, that is simply a well-settled rule. The Court should turn to *Estate of Thornton v. Caldor* as a prior statement of it. There the Supreme Court invalidated a law that required employers to accommodate workers' religious days of rest in all instances without

exception because that law imposed on employers the costs of having to find someone or hire enough staff to fill whatever day of rest another employee required, and it also required the other employees the inconvenience of having to fill in those positions.

The Supreme Court held in *Cutter* V Wilkinson that RLUIPA, which is RFRA's sister statute, must be interpreted so as to take into account these third-party harms in order to comply with the Establishment Clause.

So here, Your Honor, the exemptions here force plaintiffs and other women to bear the costs of Notre Dame's religious objections either by paying out of pocket for their contraception or to also pay now copays under the regime that Notre Dame has established.

And in addition to those financial burdens, it also, for many women, will limit their choice of contraception because they must also pay for the medical advice that they receive about which contraception is right for them.

And so if they are experiencing side effects from a type of contraception, they may be deterred from returning to the doctor to see if there's a different form that's better for them because, again, they would have to pay out of pocket for that additional doctor's visit.

The Establishment Clause issue here is also that there is no substantial burden on Notre Dame's religious exercise under

the accommodation and thus this grants Notre Dame a wholly gratuitous new right on the basis of its religious beliefs, and that is an impermissible promotion of religion. Indeed, the rules single out this particular religious belief for extremely favorable treatment that is provided to no other request for an accommodation because under the rules there is no test for the sincerity of a religious belief. There is no test for the nexus between what is objected to and what is excluded from the plan, and there is no test for the burden. And so this is a unique, special, and extremely favorable treatment of the religious beliefs at issue here.

Turning to the substantive due process claim. We can rest on the papers except to say that *Harris v. McRae* is just not controlling here because the government already wishes to provide the subsidy, and the government action here is authorizing Notre Dame to then intervene and block that provision. And so that's interference that implicates the substantive due process pleas of plaintiffs and other women.

And further, I just would like to, again, rest on the papers on the equal protection except to address one statement made by government counsel, which is that the Equal Protection Clause actually can apply even when it is a small class or single individual who is being discriminated against when that discrimination is based on a suspect classification.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Dick, I will give you just a couple of minutes to reply.

MR. DICK: Thank you, Your Honor.

Thanks very much, Your Honor. I know we've kept you here long enough already, so I will keep it brief on just a few points.

Starting on the settlement. We do think it's well within Your Honor's discretion to hold off on deciding that. Plaintiffs don't dispute this Court has the discretion to wait until the final rules are resolved.

As you noted, they haven't moved for preliminary injunction. They haven't asserted that they're suffering any irreparable harm. We think the reason for that, frankly, it's not in the record, but the harms they're facing right now we think would not be sufficient because they effectively are already getting all the coverage they need.

If you look at the allegations in their complaint, my understanding from the University's health plans is that they can get oral contraceptives for a $5 copay per month. Weigh it against harms to Notre Dame forcing it to violate its religious beliefs, we don't think that that balance is particularly close.

And with respect to the two plaintiffs they discuss who have IUDs, it's not clear whether they still need to get them

or they already have them. Even if they did need to replace them, they last for three to six years, and we think at the worst-case scenario, the cost of that would average out to less than $20 a month over the life of that device.

So we just don't think there's any real emergency here. They haven't alleged an impediment to actually being able to get any of the services they want. So we do think it would be reasonable. There's no crisis. As you noted, this is a gigantic mess across the country. The Supreme Court is going to have to resolve this. So to do this in an orderly fashion, to most efficiently use this Court's resources, and stay out of the quagmire of weighing in on the settlement agreement.

To address that settlement briefly, I do want to emphasize just how far out on a limb the plaintiffs would put Your Honor to hold that this would be a reviewable settlement agreement. We think it's quite clear that this is a nonenforcement agreement and that this type of nonenforcement agreement is not reviewable.

If you look at the settlement itself -- I was part of the settlement negotiations. I can tell you it has always been understood as a nonenforcement agreement. That's made clear both in paragraph 2 and paragraph 4.

In paragraph 2, it does refer to --

THE COURT: What's the distinction you are drawing?

MR. DICK: So it does not affect the substantial

rights of the plaintiffs if they want to bring claims. It only says the government will not enforce the mandate or the regulations against Notre Dame. It does not affect the substantial rights of the parties. If the plaintiffs want to bring their own claims, they can bring those claims independently.

Because what the settlement agreement clearly says is the government will treat the plaintiffs as exempt from the regulations, so that contemplates two different things. There may be regulations that require Notre Dame to provide the coverage. It just says the government will not enforce. It expressly says "enforce" in paragraph 4.

And in paragraph 2 it says, "The government agrees to abide by the terms of the permanent injunction in *Zubik v. Sebelious*." If you look at that order that's cited, that order specifically refers to "The government will not apply or enforce the requirements in the regulations." So we think it was clear to everybody at the time that this agreement was just that the government was not going to enforce the mandate against the regulations. The plaintiffs have a private right of action they could assert, and they just can't get the government to enforce it on their behalf.

So we think in that type of situation *Heckler* makes quite clear that you can't have judicial review of that type of nonenforcement agreement. The contrary argument made by the

plaintiffs --

THE COURT: So I guess -- explain how that would work. Let's say in the future an individual plaintiff would want to enforce their rights under some contraceptive mandate. How would they go about doing that?

MR. DICK: They would file a private cause of action, a private claim --

THE COURT: Against who?

MR. DICK: Against Notre Dame under ERISA saying there's a regulation that says you have to --

THE COURT: How does a student do it under ERISA?

MR. DICK: So it's not clear to us whether students have a private claim under ERISA. If not, that's Congress's choice not to grant them that right, and it is sometimes the case that there is no private right of action to assert a claim like that. Sometimes if you're a private party, you just have to rely on the government's enforcement discretion. And sometimes --

THE COURT: They can't here.

MR. DICK: Sometimes the government will decide not to enforce a law to benefit a third party just like in *Heckler* where the parties were going to be executed by drugs that they claimed from unlawful, and the government said, "We're not going to enforce the law that you think makes those execution drugs unlawful." The Supreme Court said, "I'm sorry. Even

though it would benefit you, you don't have the right to sue to make the government enforce a law that will benefit you."

That happens every day with all kinds of laws. It happens with murder laws. It happens with obstruction of justice laws. Lots of people would like to see those laws enforced, and sometimes the government decides not to bring the prosecution, and parties who would benefit from enforcement nonetheless can't enforce the government to enforce the law.

THE COURT: But the point remains then -- you started by saying that they retain a private right of action, but they really don't retain a private right of action.

MR. DICK: Well, they retain a private right of action to the extent Congress gave them one. We think it's clear that they had that private right of action --

THE COURT: Which is to say that they have no private right of action?

MR. DICK: With respect to the faculty and staff plan, they clearly do.

THE COURT: That I understand.

MR. DICK: With respect to the student plans, it's not clear whether they could sue the insurance company, whether they could sue the University. We haven't taken a definitive position on that because we don't know. But even if they don't have a private right of action, my point was it's still not the case that just because you don't have a private right of action

you can compel the government to enforce the law to benefit you.

THE COURT: I understand that.

MR. DICK: Because in *Heckler* there was no private right of activity, and they still couldn't compel that type of thing.

Just briefly on the two cases they mentioned, *Executive Business Media* and *Carpenter*. Those are addressed at pages 9 and 10 of our reply brief. We think they're clearly apposite because those involved substantive regulations and actions that changed people's rights. It didn't just say, "We're not going to enforce." Neither was a nonenforcement case.

In *Executive Business Media*, the government actually entered a settlement agreement that granted a no-bid contract to someone, and there were regulations that specifically said, "You have to follow competitive bidding rules."

Likewise in *Carpenter*, the government entered a settlement that granted a disputed property right to someone, and there were regulations that said, "You have to do other things when you're renting a property."

The relevant point here is that there's no regulation or statute that regulates how the government is going to enforce whatever the mandate may be. And so in that type of situation, when there's no law saying how the government or whether the government needs to enforce anything, there's just nothing for

the Court to review, and so that kind of decision is entrusted to executive discretion.

THE COURT: So do you take the position that if three years from now there's new regulations that go back to the old paradigm that your client is inoculated by virtue of this settlement agreement?

MR. DICK: Well, Your Honor, we take the position that the government agreed not to enforce, and we think that if the government did enforce it would be in violation of that agreement. And we would then fight with the government to enforce, and there would be a dispute.

THE COURT: That is to say yes.

MR. DICK: Yes, that would be a dispute about what the remedy is. That's the same with any type of settlement agreement private parties reach with the government all the time, and we're quite confident we would win in a dispute about that.

THE COURT: Even if it was contrary to then existing rulemaking?

MR. DICK: Right. Well, rulemaking is about the substantive law, not about whether the government is going to enforce. So there can be a rule that requires something, but the government may decide not to enforce that rule. And we think that this settlement agreement doesn't constrain the government in what kind of rules it makes, but it does

constrain the government from enforcing against the particular named parties here.

THE COURT: Right. Which is to say that if they change the rules in 2021, you won't have to follow them.

MR. DICK: That's our position, that the government would not be able to enforce them against us. We think the plaintiffs would have a right to bring a private cause of action.

THE COURT: Why were these settlements -- there is a backroom feel to this.

MR. DICK: Yes, Your Honor. We think the standard process was followed here, so two points on that.

One, the plaintiffs in those cases, who we don't --

THE COURT: I literally had no idea why these cases just kind of disappeared.

MR. DICK: Well, yes, Your Honor. So, again, on the two points. Number one, the plaintiffs had not intervened in this court. They had filed a motion to intervene, but they were not yet parties. So I'm talking about the Jane Doe intervenors.

THE COURT: Right.

MR. DICK: I don't mean to call them plaintiffs. They were not plaintiffs. They were not parties, and so there was no ordinary course in which they would have been part of those settlement negotiations for that reason.

In addition, because the settlement agreement did not affect their substantive rights, it only affected the government's decision whether or not to enforce, we don't think it had any impact on any third-party rights, so there was no reason to bring them in.

THE COURT: Why would the government have kept these quiet? That's what I don't understand.

MR. DICK: I'm not sure the government kept them quiet, Your Honor. You'll have to ask the government for why it proceeded in the way they did, but I don't think the government refused to provide them in FOIA. I think the government didn't put out a press release and say, here you go, but I think this was just done -- the justice department isn't necessarily in the process of publicizing all of these, and it was a settlement that settled out of court.

THE COURT: My experience is totally different from that. Boy, they send out press releases all the time notifying the public what's going on and what they're doing. But I will talk to your colleague here.

MR. DICK: Sure.

I just have one more brief point on RFRA, which is -- I want to emphasize why our primary RFRA argument here is entirely consistent with Your Honor's previous view of the accommodation, which is to say, even if you don't think the accommodation imposes a substantial burden, we don't think that

matters here because there's nothing in any statute that requires the accommodation to be imposed as a matter of regulation much less enforced against any particular party, right.

The accommodation was a completely discretionary executive regulation that came about in response to what was perceived as a substantial burden under the statute which the Supreme Court recognized in *Hobby Lobby*. The only statutory provision at issue is the provision that says preventative care has to be part of a health plan. *Hobby Lobby* says that can't apply to a religious objector, right. That's the statutory burden. And once that's true, once there's an exemption that RFRA requires from the statutory burden, which says you've got to provide this stuff as part of your health plan and pay for it, right, once there's an exemption required for that, the accommodation is just a discretionary tool that the executive may choose to adopt or may not choose to adopt.

But there's no colorable argument anywhere that the accommodation is somehow required by any statute, and therefore we don't see how it can be argued that giving an exemption from the accommodation in any way violates any statute because the accommodation is not required by anything in the first place. It is completely a discretionary tool.

So what the Supreme Court said in *Hobby Lobby* was, you know, there's this statutory requirement to provide the stuff

as part of your health plan and pay for it. That can't be enforced against a religious objector, and so there's a number of objective less restrictive means that the government could use.

One of those might be the accommodation. One of them might be to set up a different program where you subsidize contraception in some different way without having to get parasitic on the plan, on the health plan, of the religious objector at all. You could set up Title X clinics, and we think that's exactly what the government has done here.

And in particular, we think the only thing that they have identified as Notre Dame not providing, which is emergency contraception, this is the Plan B and ella, category of drugs that can cause the destruction of a fertilized egg, which some consider to be abortion, those are available at Title X clinics.

There's a Title X clinic three miles from Notre Dame's campus which anybody can go into. And on the website -- it's Olive Health Center -- it says, "We're not gonna turn away anybody that cannot afford these. Anybody can get these for free if they need them." And so we really, again, think there's no impediment to access because federal funds go to those Title X clinics.

It's like saying, you know, there's a liquor store down the street that anybody can go to and get something for free,

but we're, nonetheless, going to require a Baptist or a Muslim to provide liquor instead. We think there's a way to do this that respects the religious conscience of people who don't want to have any part in providing and have an independent clinic like that that's going to allow people to get access to it if they need it.

I think that conflict is especially irreconcilable. If you look at the *Zubik* oral argument, Your Honor -- I would just urge you if you haven't read that transcript -- I think the solicitor general, which was under the previous administration, made two key concessions there that seriously call into question. It did not concede the substantial burden under the accommodation for two reasons.

One of them was that as an ERISA matter, once the accommodation is invoked, the objectionable coverage is actually provided as part of the same plan as the sponsor. Because under a self-insured plan, the TPA has no authority to provide anything other than what the sponsor authorizes and no authority to provide anything other than as part of the plan. That's just a feature of ERISA law.

So at least for self-insured plans like Notre Dame's, you can't have a TPA providing something outside of that. So that's one point. That's actually part of the same plan, and we quoted that in our brief and cite to where the government admitted that.

And the second point is that --

THE COURT: There was an argument in the Ninth Circuit that they were explaining to the Ninth Circuit the exact opposite of that, that it is really a separate plan.

MR. DICK: That's certainly not the case for self-insured TPAs and --

THE COURT: No, they were saying for self-insured, like Notre Dame, where they have a TPA, that the TPA has to establish -- "plan" is a term of art.

MR. DICK: Correct.

THE COURT: But speaking pragmatically, a separate mechanism by which they provide this contraceptive wholly separate from the underlying insurer.

MR. DICK: Well, Your Honor, they call it separate in certain places, but if you look at the concession in the Supreme Court --

THE COURT: I will have to read that. I understand the point.

MR. DICK: -- it is part of the same plan.

THE COURT: I appreciate that.

MR. DICK: And the second thing is, as an ERISA matter, also a third-party administrator is not authorized to provide any coverage that the plan sponsor itself does not effectively say is okay, does not authorize. And so that's why unless the University files the self-certification or the

notice that the regulations require, the TPA literally will not have any authority or any obligation to provide that coverage, right.

If Notre Dame just sat on its hands --

THE COURT: This is the trigger point.

MR. DICK: Correct.

And Your Honor's previous opinion said the TPA is required to provide the coverage regardless. Respectfully, that's just incorrect as a matter of law because the TPA only acts as an administrator, only provides the coverage that the University says, "Here is the menu of our plan, TPA now provide it."

And so there's no obligation on the TPA, for example, just under the regular statutory mandate. There's no obligation on the TPA. There's an obligation on the plan sponsor, on Notre Dame, to include this coverage as part of its plan; but if Notre Dame said, "no" and sat on its hands, it would get hit with massive penalties, nobody would provide the coverage, and that's why we think it is really a trigger, and forcing Notre Dame to do that really does make a difference whether it's provided or not.

Your Honor, if there's no further questions, that's all I have today.

THE COURT: Thank you.

MR. DICK: Thank you very much.

THE COURT: Just a couple of minutes because I do

have to run here, but I don't want to cut you off too much.

MS. KOPPLIN: Well, thank you, Your Honor, and I will try not to belabor anything you've heard a lot about already but there are a couple points that I wanted to make.

THE COURT: Sure.

MS. KOPPLIN: Just going in the same order that plaintiffs went, starting with the settlement agreement. I mean, as you just heard from Notre Dame and from us, it's now very odd because plaintiffs are, essentially, taking an interpretation of the settlement agreement that the parties don't take, that is, that it has some effect on individual substantive rights and then asking you to overturn it on that basis. And it's also just against a clear reading of the text.

They read you from paragraph 2. The key language in paragraph 2 is that the government will treat plaintiffs and their health plans, et cetera, et cetera, et cetera, as exempt. Everything that follows and the letters after paragraph 2 is sort of a definition of what the policies are that it's going to treat them as exempt from. But that's the key kernel here, is that what the government is going to do under the settlement agreement is going to treat the signatories as exempt from these certain policies. So this has no effect on any other private party's rights. Whether they have them or they don't, that remains the same before and after the settlement agreement. That's not being changed.

There was some discussion of the fact that this is also a prospective agreement, that it's forward-looking. Without going too far into that, I'll just say this whole question of what kind of a bargain was made to reach the settlement, what kind of things that both sides agreed to give up -- I mean, obviously, it's a better bargain to offer if you say, "I will not enforce this against you for one week versus I will not enforce this against you for a month versus if we create a new rule next month will I enforce that rule against you," that that question of what was kind of brought to the table on both sides is one that for the reasons previously discussed should be committed to the executive branch's discretion in how to settle a case, that kind of thing.

THE COURT: What did the government get out of the settlement agreement?

MS. KOPPLIN: The end of the litigations.

THE COURT: Oh, really?

MS. KOPPLIN: Well, with -- it's the suits -- the listed suits brought by Notre Dame and the other signatories of the settlement agreement.

THE COURT: There's no end to this. You didn't get anything that you bargained for in that regard. I mean, you've said that -- seriously -- that you guys wanted to buy peace. That's nonsense. That's complete nonsense. That's why we're here.

MS. KOPPLIN: Well, in light of what a mess this has become, I mean, I will just say, we see that as support for our argument about why the agencies need additional leeway in dealing with RFRA, because of the sort of impossibility of threading a needle.

THE COURT: Wouldn't it be easier to get this through Congress? I mean, that's the real answer.

MS. KOPPLIN: Just moving on from that, this case is so different than the cases that plaintiffs cite like *Executive Business Media*. In *Executive Business Media*, there was a regulation that told the government, "Only assign these contracts through a competitive bidding process," and the government tried to enter into a settlement agreement but said, "We're going to give you a contract without any competitive bidding."

There's no analogous provision here, which would be if the plaintiffs found something in the ACA that said, "Okay, government, don't settle any cases in a way that lets people not provide contraceptive." There's just no such command about how the government should settle litigation, and those cases are all persuasive only, and so the Court should just consider for whatever (indiscernible) discourse they have, which we don't think is very much.

Finally, plaintiffs in the settlement agreement suggest that there's some kind of usurpation happening of the executive

function. I think it's actually quite the opposite. I mean, we cited a number of statutes in our brief that give discretion for controlling litigation on behalf of the United States to the Attorney General, and I think as you alluded to, that's part and parcel of it, is the decision when to settle litigation and that's part of the separation of powers in the other direction. The president, who's elected by the people, gets to select the Attorney General, and that's the way that this process will be managed, not through the courts.

And I think at the very end of the settlement agreement -- I still don't understand necessarily --

THE COURT: I totally agree with you on that. That's an important point. But where it falls off the wagon is if, you know, the White House changes again in 2021, you've effectively prevented -- and the rules change again -- you've effectively prevented these students and these folks from benefiting from those new rules by virtue of the way it's been settled.

I mean, am I wrong on that?

MS. KOPPLIN: I mean, I don't want to go too far into a hypothetical, what might happen in 20 years and what regulations might exist then and who would be enforcing them against --

THE COURT: I'm just responding to your point -- and I accept it and totally agree with it, by the way -- that

that's the way the system works. But why should it work prospectively like that? That's troubling to me.

MS. KOPPLIN: I mean, I guess I'll just say I don't know too much about these issues. I think they're also a little bit above my pay grade, but we discussed earlier these internal DOJ guidance that the plaintiffs brought in. And I think we're kind of on the same page. They're not really binding. But I will just say the concerns that you mention are some of the same concerns that are discussed there, so it's not that DOJ doesn't have guidance on this. But as I mentioned, DOJ has a process, and that process allocates discretion to various people to make exceptions and to decide how to pursue its objectives, and that process was followed here.

The last thing I'll say about the settlement agreement is just that I think actually on the merits their arguments that the settlement agreements violate the constitution or violates the ACA are actually exceptionally weak for the same reasons we discussed and for the kind of additional reason that the settlement agreement is just a very strange vehicle.

She mentioned regarding the Equal Protection Clause you can discriminate against a class of one. Sure, you can discriminate against a class of one. My point was more I've never heard of an equal protection case where the class was sort of everyone who signed the settlement agreement is the classification that we're using.

Turning to the final rules. On the procedural point about how the final rules were entered into, I think the key question that you asked was, "Well, what were the agencies supposed to do then?" And I heard plaintiffs to say that the agencies should have invalidated the IFRs and then began again. There's several problems with this.

The first and the biggest problem is that has no source in the APA. The APA contains no such requirement like "Thou shall then invalidate this IFR" and then go forward. And *Vermont Yankee* says there is no federal common law for the APA. So if it's not in the APA, the Court should not be imposing those restrictions on the agencies.

Finally, here, as a logical matter, the IFRs have been enjoined nationwide several times over at that point, so it's not clear what effect it would have had for the agencies to also say, "Okay, we're also going to invalidate them." They were governing no one at the time that these comments were being considered and at the time that the agencies were doing this.

And the last thing I will point out on this question of how the agencies considered the comments, in addition to the fact that the *Steel Corps* case really is on point here. It's a different statute, but it really is the same analysis of what do we look at to see whether or not the agencies considered comments. And the conclusion is that seeing their responses of

the comments were written into the final rule is probably enough.

But the final point is that the Eastern District of Pennsylvania case, which that opinion, the most recent one, plaintiffs generally like it a lot, and the judge did not agree with the government on very many points, but she did agree with us that the agencies were likely to show that they had successfully considered all of the comments when they went back to do the final rule. So we think that's actually a really important point, and the fact that she reached that conclusion should carry a lot of weight.

Turning to the substantive issues about the rules. It's strange because plaintiffs are talking a lot like the church exemption and the accommodation just don't exist. And the authority for those has to come from somewhere. And the question is, if it doesn't come from the ACA and it doesn't come from RFRA, then where would it possibly come from?

I think I hear them to suggest now that this is somehow related to *Amos*, but that really doesn't make sense. In *Amos* the Supreme Court was analyzing a statute that exempted churches from Title VII to see if that statute satisfied the establishment clause. So it's not that *Amos* would provide any separate authority somehow for entering into an exemption.

And on this question of our interpretation of the statute, the language that was given to HRSA and to HHS was very broad,

and I don't think it's unusual to think that Congress would have expected some kind of religious exemption to be made, especially because the topic is contraception. And contraception is an area where there are a number of exemptions and a number of religious accommodations. There's the Hyde amendment, there's the Church amendment, and now, I mean, the one named for Frank Church, not the one we are talking about with the churches and integrated auxiliaries.

It's just an area where Congress may have had a background expectation, and it seems strange to me to suggest that our interpretation is foreclosed and that Congress could never have considered the agencies would be able to allow religious exemptions here. I think if the provisions were more specific, maybe plaintiffs would have more of a point, but I think it's kind of the opposite too in that if Congress had actually been listing specific contraceptive services, Congress had been listing, okay, sterilization services, that might have caused Congress to pause and talk about religious exemptions itself instead of just kind of saying, "Okay, this whole ball of wax, HRSA, is for you to figure out."

Plaintiffs, of course, note that Congress rejected a Congress amendment, but we don't know which way that cuts. It's hard to draw any conclusions from that. Perhaps Congress rejected it because they wanted to see what HRSA was going to do. Perhaps Congress rejected it because they knew, hey, we

have RFRA, which is this background norm telling the agencies not to violate -- not to impose substantial burdens on religious practice without a compelling reason, so we just don't really know what intent from Congress to draw from that.

Turning to RFRA. There is a lot of discussion of the past cases here and before the Seventh Circuit. Now, of course those cases at the Seventh Circuit were ultimately vacated, and the entire chain was done on a pretty thin record. I just -- I don't think it's quite as overwhelming as plaintiffs think it is, especially since both the Seventh Circuit opinions were a 2-1 decision with a dissent.

Plaintiffs also are now trying to draw in cases from the Third Circuit like this *Real Alternatives* case. That case does not say what plaintiffs say it says. It did not reaffirm the prior holding. The part the plaintiffs are talking about is actually dicta because the most recent version was not about whether or not an employer was substantially burdened, so the Court just couldn't have reached any holding about whether or not employers were substantially burdened in that case, and, of course, it's another out-of-circuit case.

Finally, just briefly turning to the constitutional claims. I think I'll just rely on what we previously said as far as due process and equal protection goes, but to address the Establishment Clause, they discuss here some of these alleged burdens on third parties.

Certainly, we agree that the Establishment Clause is a limitation the government has to follow. But the Supreme Court has shown that there is a space in between the Establishment Clause and the ability to accommodate religious beliefs, and many of these accommodations that the Supreme Court has given the okay to in the past impose some burdens on third parties. It cannot be the case that there can be no incidental effect on someone else.

Every time, let's say, that a church entity is given a tax exemption, those taxes are collected from someone else, or every time a church is allowed to fire its building engineer as in *Amos*, that's an individual who was burdened by that decision. And all of the same reasons that applied in *Amos* also applied here.

The Supreme Court said -- I think in footnote 15 -- it's not really that the government is directionally burdening that individual; it's that the government is removing its regulation and allowing the church to decide what to do with him.

It's the same thing here. The government is not directionally burdening any woman's choice to use contraceptives; it's just narrowing the burden that it places on employers to provide subsidies for them.

So similarly, I think plaintiffs say that Notre Dame has gotten some kind of a new right here that no one else is getting, but this is exactly like every other religious

accommodation. The Supreme Court in *Amos* says it's not that we're giving religion some kind of a new right to discriminate; we're just removing the government burden that was placed on them.

For those reasons, we would ask that you dismiss, and that's all that I have. Thank you.

THE COURT: All right, guys, I will take this under advisement. I'm going to get an opinion out to you as quickly as I can. I can't promise -- I have a lot to unpack here. I do very much appreciate the excellent advocacy.

Thank you.

MS. BANKER: Thank you, Your Honor.

(A recess was had at 12:34 p.m.)

* * *

(End of requested transcript.)

CERTIFICATE

I, Stacy L. Drohosky, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

Date: August 20, 2019

S/Stacy L. Drohosky
S/STACY L. DROHOSKY
Court Reporter
U.S. District Court